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THE NATIONAL LEAGUE OF CITIES,
an Illinois Corporation, on
behalf of its member cities,
1620 Eye Street, N.W.
Washington, D.C. 20006,

THE NATIONAL GOVERNORS' CONFERENCE,
a District of Columbia Corporation,
on behalf of its members,
1150 Seventeenth Street, N.W.,
Washington, D.C. 20036,

The State of ARIZONA
N. Warner Lee, Attorney General
State Capitol
Phoenix, Arizona 85007

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, Tennessee
Milton H. Sitton, Director of Law
204 Courthouse
Nashville, Tennessee 37201,

The City of SALT LAKE CITY, Utah
Roger F. Cutler, City Attorney
101 City and County Building
Salt Lake City, Utah 84114,

The City of LOMPOC, California
Alan Davidson, City Attorney
119 West Walnut Avenue
Lompoc, California 93436,

The City of CAPE GIRARDEAU, Missouri
Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

The State of DELAWARE
Richard Gebelin, State Solicitor
Department of Justice
Wilmington, Delaware 19801,

The State of INDIANA
Theodore L. Sendak, Attorney General
State Capitol
Indianapolis, Indiana 46204,

The State of IOWA
Richard C. Turner, Attorney General
State Capitol
Des Moines, Iowa 50319,

The State of MARYLAND
Francis B. Burch, Attorney General
One South Calvert Street
Baltimore, Maryland 21202,

The State of MASSACHUSETTS
Francis H. Bellotti, Attorney General
State House
Boston, Massachusetts 02133,

The State of MISSISSIPPI
A.F. Summer, Attorney General
State Capitol
Jackson, Mississippi 39105,

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The State of MISSOURI
John C. Danforth, Attorney General
Supreme Court Building
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State Capitol
Helena, Montana 59601,

The State of NEBRASKA
Paul L. Douglas, Attorney General
State Capitol
Lincoln, Nebraska 65809,

The State of NEVADA
Robert List, Attorney General
Supreme Court Building
Carson City, Nevada 89701,

The State of NEW HAMPSHIRE
Warren B. Rudman, Attorney General
State House Annex
Concord, New Hampshire 03301,

The State of OKLAHOMA
Larry D. Derryberry, Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105,

The State of OREGON
R. Lee Johnson, Attorney General
100 State Office Building
Salem, Oregon 97310,

The State of SOUTH CAROLINA
Daniel R. McLeod, Attorney General
Hampton Office Building
Columbia, South Carolina 29201,

The State of SOUTH DAKOTA
William J. Anklow, Attorney General
State Capitol
Pierre, South Dakota 57501,

The State of TEXAS
John L. Hill, Attorney General
Supreme Court Building
Austin, Texas 78711,

The State of UTAH
Vernon B. Romney, Attorney General
State Capitol
Salt Lake City, Utah 84114,

The State of WYOMING
David B. Kennedy, Attorney General
210 State Capitol
Cheyenne, Wyoming 82001,

Appellants,

v.

HON. PETER J. BRENNAN,
Secretary of Labor of the United States,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Continued)

BRIEF FOR APPELLANTS

Counsel for Appellants are the above-named State Attorneys General, Metropolitan Government and City Directors of Law, City Attorneys and:

CHARLES S. RHYNE
WILLIAM S. RHYNE
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Appellants

Of Counsel:

J. KEITH DYSART
General Counsel, Council of State Governments
1150 Seventeenth Street, N.W., Suite 602
Washington, D.C. 20036

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OCTOBER TERM, 1974

No. 74-878

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

This Case raises the question whether Public Law No. 93-259, 88 Stat. 55 (hereafter sometimes "1974 Amendments", amending the Fair Labor Standards Act (hereafter sometimes "Act"),[1] the Portal to Portal Act,[2]

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[1] c.676, 52 Stat. 1060, *as amended* 29 U.S.C. § 201 *et seq.* (1970)

[2] c.52, 61 Stat. 84, *as amended* 29 U.S.C. § 251 *et seq.* (1970). The statute of limitations provisions of § 6(d) of the Portal to Portal Act, 29 U.S.C. § 255(d), governing actions against States and political subdivisions under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) are amended by § 6(d)(2)(A) of Public Law No. 93-259. This amendment responds to the decision of this Court in *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279.

and the Age Discrimination in Employment Act,[3] to apply to all employees of States and their political subdivisions, are constitutional.[4] The questions presented involve whether our Federal system of Government as laid out in the entire Constitution is protected against subversion through a congressional claim that the entirety of each State Government and each local Government is an enterprise engaged in commerce or in the production of goods for commerce and can be regulated by the Federal Government by calling its governmental operation commerce. These questions have never been before this Court as now presented.[5]

[3] Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. § 621 *et seq.* (1970). The definitions of "employer" and "employee" in §§ 11(b), 11(c) and 11(f) of the Age Discrimination in Employment Act, 29 U.S.C. §§ 630(b), 630(c), and 630(f) are amended by §§ 28(a)(2)-(4) of Public Law No. 93-259 to include States and political subdivisions of States.

[4] The effect on the system of constitutional Federalism of the amendment of each of these three acts is similar; State and City control of Government operation is usurped by including States and Cities within each Act. Because the fiscal impact is greatest from the amended Fair Labor Standards Act, that act (hereafter sometimes "Act") will be treated in detail. Appellants' constitutional objection applies to the amendment of all three acts.

[5] Other cases involving the collision between the Federal commerce power and constitutionally protected Federalism are pending before this Court in the cases of *Fry v. United States*, No. 73-822 (argued Nov. 11, 1974) and *California v. United States*, No. 74-739, *petition for certiorari filed*, 43 U.S.L.W. 3360, involving the Economic Stabilization Act of 1970; and *Iowa v. Brennan* No. 73-1565, *petition for certiorari filed*, 42 U.S.L.W. 3064, involving the 1966 amendments to the Fair Labor Standards Act.

This Case concerns the entire Constitution's scheme of Federalism, the basic constitutional sharing of Government power under our Federal system of Government, and whether the constitutional freedom of State Governments to carry out their internal governmental operations free from interference by the Federal Government occupies a higher protected status under the Constitution than any effect of the entirety of each State and local Government upon the "national free trade market" created by the Commerce Clause.

OPINION BELOW

The Order, Findings, and Opinion of the United States District Court for the District of Columbia, Civil Action 74-1812 (Dec. 31, 1974) (per curiam) is unreported but is included in the Appendix filed with this Court, App. 643-653.

JURISDICTION

This Suit was brought under 28 U.S.C. §§ 1331 and 1337 for injunctive and declaratory relief that all the 1974 Amendments to the Fair Labor Standards Act, Pub. L. No. 93-259, 88 Stat. 55, *amending* 29 U.S.C. § 201 *et seq.* (1970), made applicable to States and Cities, violate the principles of our Federal system of Government created by the entire Constitution of the United States and particularly the Fifth, Tenth, and Eleventh Amendments to the Constitution and cannot

be rationally based on Art. I, §8, cl. 3 of the Constitution. This action was filed in the District Court on December 12, 1974. The District Court, having been constituted a Court of Three Judges, dismissed the Complaint and denied Plaintiffs' Application for a Preliminary Injunction on December 31, 1974. In its Order, the District Court stated it was acting under both Rule 12 and Rule 56, Federal Rules of Civil Procedure. (App. 652). On December 31, 1974, Plaintiffs noted their appeal in the District Court and applied to this Court for a stay. An injunction *pendente lite* was granted by the Chief Justice of the United States on December 31, 1974, and continued by this Court on January 13, 1975 on condition that the Jurisdictional Statement be filed by January 17, 1975. The companion case of *California v. Brennan*, No. 74-879, is an appeal by Plaintiff-Intervenor State of California from the same Order of the District Court below. The Jurisdictional Statement was timely filed, and an expedited briefing schedule agreed among counsel. The jurisdiction of this Court to review the District Court's Order by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether all State and local Governments are engaged in commerce among the States thus conferring constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and local Government employees.

2. Whether all State and local Government affects commerce among the States to an extent which confers constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and local Government employees.

3. Whether a Federal Act which usurps control of State and local essential Government services by increasing the cost of providing some services so greatly that these and other essential Government services must be altered or curtailed, and by conflicting with fair and valid State and local laws governing public employment and public debt, can have a rational basis under the Commerce Clause, where States and local Governments neither are in commerce nor provide essential Government services interstate.

4. Whether the careful balance struck between the Federal and the State Governments in the Constitution requires that a more direct impact on commerce be shown before the Commerce Clause can be used to rationalize an abrogation of the constitutional Federalism, in the form of a Federal preemption of control over the hours, wages and other terms and conditions of employment of State and local Government employees for the first time in 200 years, than the impact on commerce necessary to be shown to regulate private industrial functions.

5. Whether *Maryland v. Wirtz*, 392 U.S. 183, holding the Fair Labor Standards Act's "enterprise" concept to be constitutional under the Commerce Clause as applied to employees of those State-owned hospitals and schools which are in competition with private hospitals and schools is controlling precedent for

extension of that Act to all those State and local Government employees who are not engaged in such competition.

6. Whether the Due Process Clause of the Fifth Amendment is violated by applying to Government 691 pages of regulations promulgated to govern private industry, failing to recognize the unique political, economic and legal status of Government, and by issuing the only regulations particularly suited to Government (covering police and fire personnel), 39 Fed. Reg. 44141 (Dec. 20,1974), so few days before they were made effective as to make compliance impossible.

7. Whether the Eleventh Amendment is violated by a Federal Statute authorizing employee suits against States and local Governments in Federal Courts, including class actions, liquidated damages, counsel fees, and costs.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The entire Constitution of the United States, as amended, is involved in that Appellants rely upon all provisions creating the Federal system of Government.[6] Reference will be made particularly to:

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[6] There are 114 references to States in the Constitution. Other major constitutional provisions involving Federalism are:

Art. I, § 10: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts;

Article I, Section 8:

"The Congress shall have Power***

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pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws:. . .

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into an Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

Art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

Art. VI: ". . .

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

"To regulate Commerce *** among the several States ***;"

Article VI:

* * *

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;. . ."

AMEND. XIII: "§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"§ 2. Congress shall have power to enforce this article by appropriate legislation."

AMEND. XIV: "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

AMEND. XV: "§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

AMEND. XIX: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. . . ."

AMEND. XXI: "§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

"§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by

"This Constitution, and the laws of the United States which shall be made in Pursuance thereof *** shall be the supreme Law of the Land ***."

Fifth Amendment:

"No person shall *** be deprived of life, liberty, or property, without due process of law;"

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Eleventh Amendment:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fair Labor Standards Amendments of 1974 are set forth in the Appendix to this Brief.

conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

AMEND. XXIV: "§ 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

AMEND. XXVI: "§ 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

STATEMENT

This Case challenges the application of the Act to 11 million[7] State and City Government employees. By the 1974 Amendments, Congress declares it has power to legislate terms and conditions of employment for all Government employees, exempting some (such as supervisory employees) by grace. The Complaint in the District Court below set forth the State and City law and practice which would be pre-empted by the 1974 Amendments (Complaint ¶¶7-11, 16-19, 21-31, 35, 73-77; App. 10-15, 16-23, 25, 36-37).

City and State employees already receive more than the minimum wage under the Act, with minor exceptions; the average for Government employees is higher than in private industry. H. R. Rept. No. 913, 93d Cong., 2d Sess. 28-29 (1974). The areas of great increases in cost to Cities and States owing to the Act are for dual recordkeeping, new reports of City budgets (Pritchard Deposition at 33, App. 108), new Federal administrative procedures, and for overtime payments (Byrley Deposition at 64, App. 289-90). Cities and States must carry out their duties under what is left of State and local laws as well as their new, federally mandated duties. Mr. Pritchard and Mr. Byrley are experts on State and local Government. (See their resumes, Plaintiffs' Deposition Exhibit 1 and Defendant's Deposition Exhibit 39; App. 588, 566, respectively). They testified that the estimate of "billions" in

[7] In October, 1973, State and local Governments employed 11.4 million persons. PUBLIC EMPLOYMENT IN 1973 (U.S. Dep't of Commerce, 1973).

increased yearly costs is a fair and reasonable estimate (Complaint ¶44, App. 27-28) as applied to the 50 States, 18,000 Cities, 3,000 Counties and thousands of special districts created for such special functions as snow removal, sewage, drainage, and paving. (Pritchard Deposition at 89-90, Byrley Deposition at 20-21; App. 146-47, 260)

Paragraphs 45-72 of the Complaint (App. 28-36) and Defendant's Deposition Exhibits 1-36, 38, 40-48 (App. 311-566, 570-585) set forth for 10 States and 25 Cities the dollar impact of the 1974 Amendments; for these jurisdictions alone, and for the first year alone, the cost of Government operation will increase by an estimated $57 million. Paragraph 44 of the Complaint (App. 27-28) sets forth an estimate for the nationwide impact on fire personnel alone, for the first year alone: $200 million. (Letter from William F. Danielson, Director of Personnel, Sacramento, Cal., Dec. 24, 1974; App. 625). The increased costs for overtime, new Federal record keeping, new Federal administrative processes, and other burdens which produce no increase in governmental service is estimated to be in the "billions" for all State and local Governments. (Complaint ¶44, App. 27-28). The reliability of fire (and police) personnel costs as an indicator of the impact on all State and City Government employees lies with the "ripple effect" on all Government employment from these two areas. (Pritchard Deposition at 10, App. 92). Salaries for Government employees constitute 80 to 85% of City budgets. (Pritchard Deposition at 125-26, App. 170-71).

Under §11(c) of the Act, 29 U.S.C. §211(c), and regulations promulgated thereunder, 29 C.F.R. §516.1, records must be kept and preserved by "every employer who is subject to any of the provisions of the Fair Labor Standards Act of 1938 as amended". Therefore,

records must be kept and preserved even with respect to those claiming exemption as bona fide executive, administrative or professional employees under 29 C.F.R. § 516.3. Similarly, records must be kept and preserved for employees subject to other miscellaneous exemptions under the Act, 29 C.F.R. §§ 516.11-516.33. This same principle would be applied to the intended police and fire overtime exemption and the police and fire regulations, 29 C.F.R. § 553.21. Failure to maintain and preserve the requisite records is itself a violation of the Act, 29 U.S.C. § 215(a)(5); whether or not certain employees may in fact be exempt, a covered employer is subject to the sanctions of 29 U.S.C. § 216 for failure to keep these records for all employees.

Governor Askew of Florida estimates (Defendant's Deposition Exhibit 43, App. 575) that the cost to Florida annually of this record-keeping alone will be $800,000. The Appellee states in the preamble to his Regulations of December 20, 1974 on tours of duty, wages, hours, compensable time in the counting of sleep and meal time, and other employment practices of fire and police for *overtime only* will cost States and Cities $27,500,000 in 1975. 29 C.F.R. § 553 (App. 596).

The Appellee, disputing the estimates of cost of the Complaint,[8] deposed Allen E. Pritchard, Jr. (App. 86),

[8] The Appellee herein cited the congressional finding, S. Rept. No. 300, 93d Cong., 2d Sess. 26 (1974), of a cost of the 1974 Amendments to States and Cities of $28 million the first year and $162 million the second year. As required by House Rule VII, the House estimated, H. Rept. No. 913, 93d Cong., 2d Sess. 41 (1974), a cost to the Federal Government of $250,000 for the first year of operation under the 1974 Amendments and $3 million for each of the next five fiscal years.

Executive Vice President of the National League of Cities (Appellant herein) and Charles A. Byrley (App. 246), Executive Director of the National Governors' Conference (Appellant herein) and introduced 47 exhibits (App. 311-565, 568-585) wherein States and Cities declared not only the bases for their estimates of fiscal dislocation owing to the 1974 Amendments, but also the damaging effect on the amount and quality of their Government services.

1. Legislative History of the Fair Labor Standards Act Through the 1974 Amendments.

Public Law No. 93-259 amends the Fair Labor Standards Act of 1938, 52 Stat. 1060, *as amended*, 29 U.S.C. § 201 *et seq.*; the Portal to Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 251-262; and the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. § 621 *et seq*. It was passed by Congress on March 28, 1974 and signed into law on April 8, 1974. Among other changes, Public Law No. 93-259 removed a long-standing exemption of State and local Government employees and included all Government employees within the coverage of the Act.[9] With the

[9] The following provisions from Public Law No. 93-259 apply to State and local Government employees:

§ 3(d). The definition of "employer" is amended to include a "public agency".

§ 3(e)(2). The definition of "employee" is amended to exclude in the cases where the employer is a State public agency, persons who are (1) not subject to a State's civil service laws and (2) publicly elected, or member of the

exception of police and fire personnel, the Act became effective against State and local Government employees

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personnel staff, or policy making appointee, or immediate legal advisor of one publicly elected.

§ 3(h). The definition of "industry" is amended to include "other activity" in addition to the original "trade, business or industry" language.

§ 3(r). The definition of "enterprise" is amended to include within the activities deemed to be performed for a business purpose, those activities performed by any person in connection with the activities of a public agency.

§ 3(s). The definition of "Enterprise engaged in commerce or in the production of goods for commerce" is amended to include an activity of a public agency and to state that "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce."

§ 3(x). Subsection is added defining "public agency" as follows: "Public agency" means the Government of the United States; the Government of a State or political subdivision thereof; an agency of the United States (including the United States Postal Service and the Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency."

§ 6(b). Specific rates of compensation are provided for newly covered employees.

§ 7(k). Subsection is added creating a limited and diminishing exemption for police and fire protection employees (partially stated in § 13(b)(20)).

§ 13(b)(7). Phasing out the former overtime exception for public transit workers.

§ 16(b). Subsection is amended to grant State and local Government employees a cause of action against a public agency in "any federal or state court of competent jurisdiction."

§ 16(c). Subsection is amended to allow the Secretary to bring an action for both liquidated damages and back pay on behalf of an employee subject to certain conditions.

on May 1, 1974. Special amendments to § § 7 and 13 of the Act, 29 U.S.C. § § 207 and 213, exempted police and fire personnel from the Act's overtime provisions until January 1, 1975. On that date a series of replacement amendments were to have taken effect over a three year period to create a limited and diminishing exception from the Act's overtime provisions for police and fire personnel.

The Fair Labor Standards Act, as originally enacted, stated its findings in § 2(a):

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. The Congress further finds that the employment of persons in domestic service in households affects commerce." c.676, § 2(a), 52 Stat. 1060, 29 U.S.C. § 202(a) (1970).

Section 2(b), 29 U.S.C. § 202(b), declares as the policy of the Act "to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power". The power conferred for congressional action there stated is the power "[t]o

regulate Commerce . . . among the Several States" U.S. Const., Art. I, § 8, cl. 3. "Commerce" is defined in § 3(b) of the Act as meaning:

> " . . . trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

States, political subdivisions of States, and Cities were expressly excluded from the coverage of the Act by c. 676, § 3(d), 52 Stat. 1060.

An amendment from the floor of the House to remove the exclusion of employees of Government was rejected, 83 Cong. Rec. 7414 (1938), without extended debate.

In the House debate on the Act in 1938, a Member quoted, 83 Cong. Rec. 7391 (1938), from the President's special message to Congress of May 24, 1937:

> "Most fair labor standards as a practical matter require some differentiation between different industries and different localities."

Debate in the House touched on the sufficiency to invoke the coverage of the Act under the commerce power, of importation of goods which have travelled in interstate or international commerce:

> "MR. SEGER. What about the newspapers?
>
> "MR. HEALY. They would be exempt if they were involved in interstate commerce as to have any great effect.
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> "Mr. SEGER. Would that be true despite the fact they import newsprint from Canada?

> "Mr. HEALY. I do not think it would have any effect on that at all.
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> * * *
>
> "Mr. COX. If the purpose of the bill is to relieve the distressed condition of substandard workers, and if the lowest-paid workers today in this country are found in the fields of the farm and retail establishments, then why did the committee exempt these classes from the problem of the bill?
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> "Mr. HEALY. I am sure the gentleman knows the answer: because that would exceed the powers of Congress. We are limited by the Constitution to business in interstate commerce." 83 Cong. Rec. 7308 (1938).

The Act was held constitutional as applied to business and industry in *United States v. Darby*, 312 U.S. 100.

Since its original enactment in 1938, the Act has been in a continuous state of alteration by way of amendments in 1940, 1949, 1955, 1956, 1961, 1963, 1966, 1972 and finally the 1974 Amendments here challenged. Generally, these amendments have extended coverage of the Act to a greater number of industries or employees thereof, increased the minimum wage, or created or eliminated exemptions from various provisions of the Act.

The 1961 amendments, while continuing the exemption of State and City employees, created the "enterprise" concept, covering not only employees personally engaged in commerce, but also any employee of an enterprise with employees engaged in commerce. 29 U.S.C. § § 203(r), 203(s) (1970), *amending* 29 U.S.C. § 203 (1958).

In 1966, the § 3(d) exemption was ended for State and City employees in hospitals, schools and transit

companies. The entire Act, including the "enterprise" concept, was made applicable to these Government entities. 29 U.S.C. §§ 203(d), 203(r), 203(s) (1970), *amending* 29 U.S.C. §§ 203(d), 203(r), 203(s) (1964). The rationale for this extended coverage is stated in the 1966 Committee Reports:

> "These enterprises [public schools and hospitals] which are not proprietary, that is, not operated for profit, are engaged in activities which are *in substantial competition* with similar activities carried on by enterprises organized for a business purpose." S. Rept. No. 1487, 89th Cong., 2d Sess., 2 U.S. Code Cong. and Ad. News 3010 (1966); H.R. Rept. No. 1366, 89th Cong., 2d Sess. 16 (1966) (emphasis added).

These amendments were upheld as applied to State hospital and school employees in competition with private employees engaged in such endeavors by a divided Court in *Maryland v. Wirtz*, 392 U.S. 183.

In 1973 and 1974 the Congress considered removing in full the exemption of State and City employees from the coverage of the Act.

The following labor unions spoke in favor of extension of the Fair Labor Standards Act to State and City Governments: the American Federation of Labor – Congress of Industrial Organizations (Statement of President)[10] (Statement of Director, Department of Legislation),[11] the Service Employees International

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[10] *Hearings on S. 1861 and S. 1725 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess., pt. 1 at 341, 351, 355 (1973). (hereafter, *Hearings - Senate* (1973)).

[11] *Hearings on H.R. 4757 and H.R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 91 (1973) (hereafter, *Hearings - House* (1973)).

Union (Statement of President),[12] the American Federation of State, County and Municipal Employees (Statement of President),[13] International Association of Fire Fighters (Statement of President)[14] (Statement of Legislative Representative),[15] and the International Conference of Police Associations (Statement of Vice President).[16]

Governments at all levels stated that the extension of the Act to States and Cities was both unnecessary and unconstitutional.

Specific comments were made by the following local Government officials in hearings before Congress on the proposed extension: National League of Cities (Letter of Executive Vice President)[17] (Statement of Director of Personnel, Sacramento, California)[18], United States Conference of Mayors (Letter from Executive Director)[19], twenty-nine individual Cities (Letters to Sen. Harrison Williams).[20]

Secretary of Labor Hodgson had earlier testified:

> "We cannot support this proposal [extension of coverage to state and local Government employees].

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[12] *Hearings - Senate*, pt. 2, at 13a (1973); *Hearings - House* 345 (1973).

[13] *Hearings - Senate*, pt. 2, at 24a (1973); *Hearings - House* 341 (1973).

[14] *Hearings - Senate*, pt. 2, at 40a (1973).

[15] *Hearings - House* 327 (1973).

[16] *Hearings - House* 287 (1973).

[17] *Hearings - Senate*, pt. 1, at 499 (1973).

[18] *Hearings - House* 148 (1973).

[19] *Hearings - House* 367 (1973).

[20] *Hearings - Senate*, pt. 2, at 255a-269a (1973).

In 1966, enterprise coverage was extended to hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit. Here the Congress took the position that failure to cover all such institutions would have resulted in failure to implement one of the basic purposes of the act—the elimination of conditions which constitute an unfair method of competition in commerce.

"But extending coverage to all State and local employees is an entirely different matter. It would certainly involve the Federal Government in the regulation of the functions of State and local governments." *Hearings on H.R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 552 (1971); *Hearings on S. 1861 & S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 29 (1971).

Similarly, Secretary Brennan testified in 1973:

"I realize that the 1966 amendments extended enterprise coverage to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit.

"The reason for the extension to this group of employees was that failure to cover all employees of such institutions would constitute an unfair method of competition in commerce.

"However, extension of coverage to all State and local government employees is too great an interference with State prerogatives.

"Impositions of the Federal standard for coverage, particularly for overtime, could have a

disruptive impact on many State civil service systems and the additional costs could overburden many small governmental units." *Hearings - House* 263 (1973).

In his veto of H.R. 7935, 93d Cong., 1st Sess., President Nixon said of the proposed Amendments to the Act:

"Extension of Federal minimum wage and overtime standards to State and local government employees is an unwarranted interference with State prerogatives and has been opposed by the Advisory Commission on Intergovernmental Relations." 119 Cong. Rec. H.7596 (daily ed. Sep. 6, 1973).

Likewise, in his letter of February 27, 1974, to Senator Harrison Williams, 120 Cong. Rec. S. 2516 (daily ed. Feb. 28, 1974) President Nixon recognized "the need for enacting a responsible minimum wage bill . . . ", but cautioned:

"The extension of the Federal minimum wage and overtime requirements to State and local government employees is also a problem. I appreciate the fact that the House bill under consideration tries to avoid undue interference in the operations of these governments by exempting police and firemen from the overtime requirements. However, I continue to agree with the Advisory Commission on Intergovernmental Relations that, in general, additional Federal requirements affecting the relationship between these governments and their employees is an unnecessary interference with their prerogatives. The available evidence has failed to convince me that these

governments are not acting responsibly in setting their wage and salary rates to meet local conditions. Additionally, if the Congress desires to make the minimum wage and overtime laws applicable to Federal employees, who are already adequately protected by other laws, it should place enforcement responsibility in the Civil Service Commission, which has the responsibility under the other laws."

The Senate Report on the Bill which became the 1974 Amendments (S. Rept. No. 300, 93d Cong., 1st Sess. 26 (1973), S. Rept. No. 690, 93d Cong., 2d Sess. 24 (1974)). stated:

"The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well."

Neither the House nor the Senate Committee Reports refers to the possibility of labor strife of an interstate nature between State and local Governments and their employees.

Furthermore, the legislative history contains no finding that labor disputes between public employees and local Governments have an impact on interstate

commerce, or that such employees are paid substandard wages.[21]

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[21] Appellee contends in his Motion to Affirm at 12-13 that:

"In considering the 1974 amendments Congress had before it evidence of the existence of substandard labor conditions in State and local governments. An estimated 409,000 State and local government employees were paid less than $1.90 an hour in 1973[9] - at a time when the proverty level income for an urban family of four was $4,540 or approximately $2.27 an hour."

Footnote 9 to the Motion states:

"The 409,000 figure is reached by adding to the 314,000 employees covered by the 1966 amendments, earning less than $1.80 an hour in September 1973, the 95,000 employees that Congress proposed to cover additionally when the minimum was raised to $1.90 an hour."

Such statistical argumentation ignores these facts. The 314,000 figure represents employees *already* covered by the FLSA under the 1966 amendments, not those brought under the 1974 coverage here challenged. The 314,000 figure cannot be considered as those receiving "substandard" wages according to any standard of the Act then in existence since those enumerated received a minimum wage of $1.60 an hour in compliance with the 1966 "standard". The 95,000 figure (less than 1% of those employees in State and local Government) attributed to 1974 coverage results from an "estimate" by the Department of Labor. H.R. Rept. No. 913, 93d Cong., 2d Sess. 28 (1974). Nowhere does the Report indicate the basis for this estimate of those who would be "benefitted by the impact of a $1.90 an hour minimum wage rate".

To the contrary, the House Report on the Act quotes a Department of Labor Report of 1970 that:

"wage levels for State and local government employees not covered by FLSA are, on the average, substantially higher than workers already covered." *Id.*

Arguing from this Labor Department Report's statement, the House Report continues:

The committee reports proposing the 1974 Amendments noted that the Secretary of Labor, reflecting the view of the Civil Service Commission,[22] opposed extending coverage of the Act to Federal employees because the legislation would "confuse the [Commission's] administration" of special pay provisions for Federal employees in Title 5, United States Code, and "could raise jurisdictional problems of administration." S. Rept. No. 690, 93d Cong., 2d Sess. 23 (1974); H.R. Rept. No. 913, 93d Cong., 2d Sess. 28 (1974). Accordingly, the committees resolved the matter by charging the Civil Service Commission, rather than the Department of Labor, with administration of the Act's coverage of Federal employees.

On March 28, the 1974 Amendments to the Fair Labor Standards Act were passed. In signing the 1974 Amendments with "some reservations" on April 8, 1974, President Nixon, at 10 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 391-92, said:

> "S. 2747 also extends coverage to include Federal, State, and local government employees, domestic workers, and others previously excluded from coverage. The Congress has reduced some of the economic and social disruptions this extension

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"The actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." *Id.* at 29.

The Committee concludes:

"The actual impact on State and local governments then, of a 40 hour standard, will be virtually non-existent." *Id.*

[22] *Hearings - Senate*, pt. 1 at 616 (1973).

> could cause by recognizing the unique requirements of police, fire, and correctional services. Similarly, within the Administration, we will do our utmost to administer the overlapping rules which will now apply to Federal overtime."

Newly covered State and City employees immediately come under the some 691 pages of regulations in Title 29, Code of Federal Regulations, Parts 500 to 899, although only 15% of these regulations apply to States and Cities (Pritchard Deposition at 121-123, App. 167-69). In addition, 29 C.F.R. Part 553 covering police and fire employees (including security personnel in correctional institutions) was to have gone into effect January 1, 1975. 39 Fed. Reg. 44141 (Dec. 20, 1974). The Regulations, Part 553, define fire protection and law enforcement activities (§§ 553.3 and 553.4), regulate joint employment situations (§ 553.9), require overtime compensation under "mutual aid" agreements (§ 553.10), define "tour of duty" (§ 553.13), prohibit the use of compensatory time off outside the work period (§ 553.19), and require the keeping of records for both "exempt" and "non-exempt" employees (§ 553.21). Police and fire personnel are precluded from using the ruling applicable to all other employees in 29 C.F.R. § 785.21, and are regulated rather by 29 C.F.R. § 553.15 which prohibits deduction (in computing time worked) of sleeping and eating time where a shift is exactly 24 hours long or less.

In governmental activities other than police and fire, no modifications in 29 C.F.R. Parts 500-899 have been proposed or contemplated to relieve State and local Governments from falling under regulations written for, and which for decades have been applied exclusively to,

private industry. As noted above, 85% of these prior regulations are admittedly inapplicable to State and local Government employees (Pritchard Deposition at 121-123, App. 167-69).

2. Judicial History of the Act Challenged As Applied to State and City Functions including *Maryland v. Wirtz*.

The 1966 amendments to the Act came before this Court in *Maryland v. Wirtz*, 392 U.S. 183. Neither the briefs nor the opinion in that case reflect a thorough consideration of the basic nature of constitutional Federalism. The basic scheme of the entirety of the Constitution as designed to provide an overriding protection for the shared governmental powers of Federal and State Governments, our Federal system of Government, was not weighed against the constitutional protection of a "national free trade market" embodied in the Commerce Clause. That State Governments are given a high constitutional protection of their functions as Governments, a higher rank than the Constitution's protection against small impacts upon commerce, was not considered. The whole concept of Federalism as embodied in the Constitution, and the constitutional distinctions between that which is governmental and that which is private commercial business, were not considered.

Factually, *Wirtz* did not consider an impact on State and City Governments of near the magnitude of the damage which the 1974 Amendments to the Act cause. This Court was not swayed by the impact of applying the Act to school and hospital employees. According to

the Bureau of the Census' report, PUBLIC EMPLOYMENT IN 1973, *supra* footnote 7, hospital employees constitute only 9.6% of full-time State and local Government employees. *Id.* at 3, Table C. Of these, the Act as reviewed in *Wirtz* exempted from coverage physicians, nurses, professionals and administrators. Pub. L. No. 87-30, § 9, 75 Stat. 71, *amending* 29 U.S.C. § 213(a)(1) (1958). Of the 49.6% of full-time State and local Government employees who are in education, PUBLIC EMPLOYMENT IN 1973 at 3 Table C, well over half are teachers, *Id.* at 9 Table 3, who were exempted from coverage by the Act reviewed in *Wirtz*, Pub. L. No. 89-601, § 214, 80 Stat. 833, 29 U.S.C. § 213(a)(1) (1964).

The Court in *Wirtz* decided only that a rational basis for application of the Fair Labor Standards Act "interstate enterprise concept" to State-owned schools and hospitals was shown by the following: (1) that "strife disrupting an enterprise involved in commerce may disrupt commerce", 392 U.S. at 192, and that schools and hospitals "are major users of goods imported from other states", 392 U.S. at 194, whose strikes "obviously interrupt and burden this flow of goods across state lines", 392 U.S. at 195; and (2) "that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise", 392 U.S. at 192. The Court did not consider Governments as Governments and the higher status of Governments under the Constitution.

The Court refused to decide:

> ". . . whether schools and hospitals have employees engaged in commerce or production. Such institu-

tions, as a whole, obviously purchase a vast range of out-of-state commodities. These are put to a wide variety of uses, presumably ranging from physical incorporation of building materials into hospital and school structures, to over-the-counter sale for cash to patients, visitors, students, and teachers. Whether particular institutions have employees handling goods in commerce, cf. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, may be considered as occasion requires." 392 U.S. at 201,

and it specifically limited its holding by stating:

"Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals." 392 U.S. at 193-194.

The Court did not treat Government operations as governmental and different from commerce.

Dissenting Justices Douglas and Stewart in *Wirtz* stated with respect to the commerce power:

"The immense scope of this constitutional power is demonstrated by the Court's approval in this case of regulation on the basis of the 'enterprise concept' – which is entirely proper when the regulated 'businesses' are not essential functions being carried on by the States.

Yet state government itself is an 'enterprise' with a very substantial effect on interstate commerce . . . If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build super-highways crisscrossing their territory in

order to accommodate interstate vehicles, . . . to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] . . . on commercial intercourse'? [citations omitted]." 392 U.S. at 204-205.

To this the majority responded:

"The Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity'." 392 U.S. at 196.

This statement was underlined by a strong and lengthy footnote, limiting the majority's decision:

"The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole state an 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of *Wickard v. Filburn*, [317 U.S. 111] and of our decision.

* * *

"Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." 392 U.S. at 196 n. 27.

In *Employees v. Missouri Dep't of Health*, 411 U.S. 279, State-owned schools and hospitals were held immune from suits by employees in Federal Court

under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b). The Court, relying on *Wirtz* for the proposition that the employees of State institutions have "a relation to interstate commerce", concluded in dictum that when Congress acts in such situations to regulate, "it may place new or even enormous fiscal burdens on the States." 411 U.S. at 284. At the same time, the Court, 411 U.S. at 286, limited the right to sue States in Federal Courts to the Secretary with these words:

> "Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor."

3. State and City Personnel Laws To Be Preempted By The 1974 Amendments.

Paragraphs 21-26 of the Complaint (App. 17-20) show State and local civil service and other personnel laws which will be superseded by the 1974 Amendments.

All States and Cities have laws covering employment of personnel and their working conditions which are separate and distinct from employees of private or business employees. These civil service and similar law provisions are quite detailed as to employment rights. Law provisions for administrative hearings generally also provide for Court Hearings. Most of the States have

collective bargaining laws applicable to public employees.[23]

The future of these State laws for public employees is clouded as it is apparent they will be eliminated in large part. Dual records for State purposes, dual processes, dual procedures and dual administrative and Court decisions will also be required to satisfy the new Federal Act and State and local law.

States and Cities seek to keep salaries on a par with industry and the Federal Government. (App. 193)

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[23]Of the fifty States and the District of Columbia, the following number authorize or permit collective bargaining by the following employees:

(1) Police – 40 States, of which 26 specifically authorize or permit such bargaining as to wages and hours.

(2) Firemen – 43 States, of which 30 specifically authorize or permit such bargaining as to wages and hours.

(3) Teachers – 43 States, of which 25 specifically authorize or permit such bargaining as to wages and hours.

(4) Other State or Local Employees – 41 States, of which 25 specifically authorize or permit such bargaining as to wages and hours. SUMMARY OF STATE POLICY REGULATIONS FOR PUBLIC SECTOR LABOR RELATIONS (United States Department of Labor, Labor-Management Services Administration, 1974).

Thus, at least 80% of the States authorize or permit collective bargaining by some or all of the above classes of employees. And at least 50% specifically authorize or permit such bargaining as to wages and hours. For the remainder of States with collective bargaining, bargaining on wages and hours may be assumed. C.f., § 9(a) of the National Labor Relations Act, Act of July 5, 1935, ch. 372, 49 Stat. 453, *as amended*, 29 U.S.C. § 159 (a) (1970), which explicitly mentions within the scope of bargaining only "wages, hours of employment", leaving unspecified the other "conditions of employment".

Collectively-bargained State and City personnel practices are, by their very nature, mutually agreeable to Government and to the employees of Government. The 1974 Amendments will supersede these State and local Government arrangements.

The 1974 Amendments conflict with, wipe out, or at least modify many State and local civil service and personnel laws, thereby creating a legal chaos unlike applicability of the Act to private business. Large penalty provisions apply to violators of the provisions of the Act and the regulations under the Act.

The degree to which this supersession, conflict, confusion and chaos may be accomplished, is shown by 29 C.F.R. § 553.2, (App. 600-02), which reserves to the Secretary's Administrator of Wages and Hours the final decision power to "determine the compensable hours of work, tours of duty and work period in applying the section 7(k) exemption."[24] The fiscal effect of this rigidity is shown, for example, by the effect on the State of Texas. State law in Texas requires a 365-day duty cycle for employees, including firemen; conformity with State law will preclude compliance with the 1974 Amendments' requirement that the § 7(k) provision for police and fire personnel is available only if tours of duty are between 7 and 28 days. The result is that adherence to State law lowers from 60 to 40 hours per week the level beyond which police and fire personnel in Texas must be paid overtime. (Pritchard Deposition at 137, 141; App. 179-80, 181-82). No longer will decisions be made locally or at State capitols on State and local personnel matters. Final decisions will come from the Administrator and Federal Courts, including this Court.

[24]Section 7(k) is added to the Act by the 1974 Amendments. Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 60, *amending* 29 U.S.C. § 207 (1970).

4. State and City Constitutional and Statutory Debt and Tax Limitations.

Paragraphs 73-77 of the Complaint (App. 36-37) set forth State constitutional debt and tax limitations which prevent deficit financing by Cities and States to meet increased costs mandated by the 1974 Amendments. As stated there, these increased costs must be met by curtailment of service levels, termination of services, or the foregoing of planned Government services. (Pritchard Deposition at 25, App. 102-03; Pritchard Deposition at 81, App. 140-41). The fear is very real that Congress, by imposing budget costs but not providing funds to pay those costs, will destroy the fiscal integrity of States and Cities.

If, as postulated by the Dissent in *Wirtz*, the commerce clause can be used as here to mandate costs upon States and Cities, their entire fiscal foundation will in fact be destroyed by the Congress. The effect of upholding congressional action nullifying these State and local debt and tax limitations upon State and local bonds is devastating. Municipal and State bonds are dependent upon State and local law binding the States and Cities, but there is no way States and Cities can bind the Congress or guarantee that a minimum wage power will not be used to mandate costs no State or City can afford.

5. State and City Estimates of Services and Personnel Practices Curtailed and Foregone Owing to the Fiscal Impact of the 1974 Amendments.

The Complaint sets forth decisions by States and Cities to alter and diminish Government services owing to the increased cost, imposed by the 1974 Amendments, of providing other Government services. The Act makes prohibitively costly certain personnel practices which had provided Cities and States needed flexibility and economies in providing Government services; among the practices adversely affected are: compensatory time off (Complaint ¶¶49,66; App. 29-30, 35), flexible scheduling practices (Complaint ¶49, App. 29-30), employment of student interns (Complaint ¶¶49,60; App. 29-30, 33-34), police and fire training (Complaint ¶¶56,69-70; App. 32, 35-36), availability of "reserve" policemen (Complaint ¶57, App. 32-33), and paid volunteers (Complaint ¶28, App. 21), institution of affirmative action programs (Complaint ¶59, App. 33), computation of payrolls (Complaint ¶63, 65; App. 34-35), membership on volunteer boards and commissioners (Complaint ¶65, App. 34-35), and joint employment (Complaint ¶¶29,46; App. 22, 29). These are illustrative, not exhaustive, as variety is a major fact and factor among State and local Governments, as they seek to adapt their resources to meet their varied needs. With the increased cost attendant to States' and Cities' inability, under the Act, to use these flexible and economical practices, States and Cities will have to curtail or forego some Government services.

In this case, an expert (see Plaintiffs' Deposition Exhibit 1, App. 588-90) in City administration testified that the 1974 Amendments would produce in Cities "a mass of confusion which is going to completely disrupt 200 years of stylized operations, which has been a tradition at the local government level." (Pritchard Deposition at 123, App. 169). He also said the Act caused great increases in costs and decreases in services. (Pritchard Deposition at 143, 151; App. 183, 189-90).

6. Order and Opinion of the District Court Below.

The Complaint, the Depositions of Messrs. Pritchard and Byrley, Deposition Exhibits consisting of letters and other documents from Governments of States and Cities, and other data of Record concerning the impact, in money spent, in services curtailed or foregone, in plans and procedures abandoned, in confusion and uncertainty, of the 1974 Amendments on State and City Government, was before the District Court below on the Appellee's Motion to Dismiss the Complaint, and Plaintiff Cities', States' and Government Organizations' Application for a Preliminary Injunction. The Court dismissed the Complaint and denied preliminary relief, making Rule 56, Fed. R. Civ. P., findings[25] as follows: that the State and City Governments before the Court are not seriously in competition with private industry (App. 650); that the impact of the 1974 Amendments may seriously affect the structuring of Government activities by reducing flexibility to adapt

to local and special circumstances (App. 650); and that States and Cities made substantial contentions that: (1) the 1974 Amendments will cause either an increase in local Government fiscal requirements or a reduction in services and personnel or both, (2) these results will obtain without any factual predicate showing that there has been in the past any substantial degree either of widespread labor unrest curtailing the flow of interstate commerce or of substandard wage scales, and (3) the 1974 Amendments will intrude upon State and City performance of essential Government functions far more than did those reviewed in *Maryland v. Wirtz*, 392 U.S. 183 (App. 651).

During the Hearing on the Motion to Dismiss and Application for Preliminary Injunction, one Member of the Court alluded, Tr., Dec. 30, 1974, at 36, to a higher-than-rational-basis test whether the 1974 Amendments are a valid enactment under the Commerce Clause, a test which was not applied in *Maryland v. Wirtz*. The Court, in its written findings and decision, expressly doubted some of the broad language of the majority in *Wirtz*. (App. 651).

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[25]The parties stipulated that the Depositions and Exhibits could be used for any purpose. Bryrley Deposition at 94, App. 309-10. They were introduced in evidence. Tr., Dec. 30, 1974, at 5, 6. The transcript of the Hearing of December 30, 1974 is not printed in the Appendix for Nos. 74-878 and 74-879, filed with this Brief.

SUMMARY OF ARGUMENT

I.

The Fair Labor Standards Act, by Amendments adopted in 1974, claims Congressional power to fix wages, hours, and other terms and conditions of employment for all State and local Government employees. Earlier regulation of salaries of State hospital and school employees remain a part of the Act. The Act actually reaches all State and local Government employees as new records are required to allow a Federal decision on those who are, by grace, exempted.

No prior Federal legislation has permeated the whole of State and local Government on such an intimate, internal, and important subject. No power "takeover" of this magnitude, operating directly on State and local Governments has ever been adopted before by the Congress.

States and local Governments, being bundles of law powers, must act through employees. Since this Act imposes regulatory controls which cover all their employees, this effectively intrudes the Federal Government into every function of every State and every local Government.

While the enormous costs of this intrusion are not a constitutional factor as such, these are a major fact flowing from the Act's provisions which overlap State and local law thus requiring dual records, dual reports, dual administrative processes, costly training of extra personnel, costly overtime, and new and expensive decisions. Employee actions are provided for in the Federal Courts for double time, penalties, attorney's

fees and class actions. Probable dual court jurisdiction is created over subject matter. The Act effectively eliminates volunteers now paid just enough to secure workman's compensation coverage or other benefits of local Government employment. Compensatory time off, joint employment, civil service provisions, and other unique State and local personnel plans designed to meet unique local needs at little cost must now be eliminated. This is done in large part through rigid uniform nation-wide rules under the Act which cause vast new costs by wiping out these unique and efficient low-cost arrangements.

That the Act imposes increased governmental costs directly on States and local Governments is not denied by Appellee. Appellee disputes Appellants' estimate of billions in costs, and tries to minimize costs, but he admits the costs are 27 millions of dollars for *overtime only* of police and fire fighters for the first year under the regulations he issued December 20, 1974.

The damaging fiscal impact of congressional mandating of great costs which breach State and local law on tax and debt limits is exceeded only by the fear and fact that such power in the Congress renders it legally impossible for States and Cities to give legally binding assurances to sell their bonds that tax and debt limits will not be exceeded in the future. They can bind themselves but not the Congress. Seemingly believing that a claim of *de minimis* impact would confer constitutional power, the House of Representatives passed the 1974 Amendments with a Committee finding that since States and local Governments have no substandard employment terms or conditions "The actual impact on State and local governments then of a

40 hour standard, will be virtually non-existent." H.R. Rept. No. 913, 93d Cong. 2d Sess., 28 n. 1 (1974).

The Senate Committee found a cost of $28,000,000 for the first year and $162,000,000 for the second year of applicability of the 1974 Amendments. S. Rept. No. 300, 93d Cong., 2d Sess., at 26.

II.

The major purpose of the Constitutional Convention of 1787 was to create a workable Federal system of Government. This Case involves all of that Federal system as embodied in the entirety of the Constitution of the United States.

The draftsmen of the Constitution made it clear in their explanations of that great charter that this governmental system of Federalism encompassed a sharing of governmental powers between the national Government and the State Governments. The plan envisioned full recognition and use of the State Governments then in being. The enumerated powers of the Federal Government were designed to do those national things the States could not adequately do. State Governments were subjected to specific prohibitions and requirements then apparent as needed to insure the operation of the Federal system of Government. This plan made it unnecessary to specifically enumerate the powers of the State Governments; that idea was not seriously considered. Even then, wide variety existed among the States in their Constitutional powers and laws as provided by their people.

Madison's NOTES OF DEBATE ON THE FEDERAL CONSTITUTION of 1787, the FEDERALIST Papers, and the ratification debates of the States make this basic Federalism concept clear beyond question. The Federal Government and the State Governments were often referred to, as "supreme" each within its own governmental area.

Hamilton articulated in FEDERALIST Paper No. 79 the view that this Court should strike down as unconstitutional any excessive assertions of power by the States or by the Federal Government. And Chief Justice Marshall embraced this implied power in *McCulloch v. Maryland*, 4 Wheat. 316, and as here, in many cases down through the years this Court is called upon to exercise that function.

A major purpose of the dual sharing of governmental powers under Federalism is to prevent centralization of power. This was a major part of the constitutional design.

This design is spelled out in the whole of the Constitution and the direct and implied restrictions there set forth even before the adoption of the Tenth Amendment. Down through the years the Federal and State Governments have built a wonderful record of cooperative Federalism and of comity and mutual respect for the governmental role of each other. Where taxes have been imposed on State Governments (*New York v. United States*, 326 U.S. 572 (with separate opinions)), or State [redacted] fees imposed on the Federal Government, (*Johnson v. Maryland*, 254 U.S. 51) this Court has invalidated these as violative of our Constitutional Federalism.

Here the Congress has by the 1974 Amendments overstepped constitutional Federalism by attempting to centralize power in itself to regulate the most intimate, internal and essential governmental function of States and local Governments of prescribing terms and conditions of employment of the employees of those Governments. As in *Kentucky v. Dennison*, 24 How. 66, 107-108, "such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights."

Another purpose of the Constitution's framers was to create a national free market for commerce by preventing State-imposed trade barriers. The prohibitions of State import and export taxes and other constitutional prohibitions were designed to help do this as well as the Commerce Clause.

For the Congress to have usurped control of terms and conditions of employment of all State and local employees as "commerce" under the Commerce Clause in 1787 would have been denounced as [redacted] by the draftsmen and supporters of the Constitution. It still is. The Commerce Clause is for regulation by Government of commercial matters not governmental matters. Such has been the uniform interpretation and understanding. The issue in this Case is not whether the Federal or State Government can regulate industry but who regulates the State Governments themselves.

In adopting this Act in 1938 and in numerous acts regulating those in commerce, Congress has exempted States and Cities in recognition of their special governmental partnership status under Federalism. Other Federal legislation has recognized the unique

differences of State and local Government as Governments from private industry and applied exemption or different approaches of comity in recognition of Governments as Governments as in the recent Employees Retirement Income Security Act of 1974. The Social Security Act is optional insofar as State Governments are concerned.

Instances of cooperation, or Federal deference to State regulation of private industry such as cable television are collected in the Brief to illustrate cooperative constitutional Federalism in action. Federal programs cannot provide the experimentation, adaption and wholesomeness of local or regional variations.

Recognition of the special expertise and unique position of State Governments, especially State Courts, is seen constantly in the deference to State Courts by the abstention and related doctrines of this Court.

Up until now State and local Governments have had wide scope in adapting local resources to their peculiar needs but now such unique local concepts as volunteerism and compensatory time off in lieu of overtime pay, are to be wiped out and replaced by rigid nation-wide uniform rules centralized under Appellee. Thus will the great concept of constitutional Federalism be destroyed. To return to Chief Justice Marshall once more and *McCulloch v. Maryland*, he also said (at 4 Wheat. 403): "[N]o political dreamer was ever wild enough to think of breaking down the line which separates the states, and of compounding the American people into one common mass." Yet that is what the Congress has done here. Madison in FEDERALIST Paper No. 46 said "ambitious encroachments" by the

Federal Government on the authority of State Governments would be "madness"!

State and local Government power over the vital functions of Government, here usurped by Congress, is protected against such usurpation by the great purpose and principles of the concept of Federalism. The 1974 Amendments are unconstitutional as in violation of that purpose, those principles and that concept.

III.

Maryland v. Wirtz did not give major consideration to the historical roots or the vast development of constitutional Federalism and the legal and factual cooperative workings of our Federal system of Government. The major focus was on the new "enterprise" concept of the Act and commerce rather than on the power of the Congress to regulate State and local Governments as against the immunities provided by Federalism.

The majority's reply to the dissent in *Wirtz* was that the postulated congressional declaring of an entire State as a commercial enterprise, and the mandating of bankrupting costs upon the State, was an event that could not happen. This has proved to be wrong. It has occurred in the 1974 Amendments. The majority called this wrong speculation, a false interpretation of its opinion. Now that the speculation is fact, perhaps the majority does not interpret *Wirtz* as upholding the 1974 Amendments.

Maryland v. Wirtz did not consider the totality of our Federal system of Government as laid against a congressional scheme impinging upon every function of

every State and every local Government. A scheme which centralizes power in Appellee to impose high cost, rigid, nation-wide uniformity, wiping out small cost arrangements developed by experience to meet unique State and local needs. And this centralization is not mandated to wipe out substandard labor conditions as such conditions do not exist among States and local Governments. They pay fair and reasonable salaries, fix reasonable hours and have civil service, public sector collective bargaining and other laws insuring that their employees have terms and conditions of employment which meet public service needs while providing fair treatment.

The scheme of the 1974 Amendments thus has no basis in fact or in constitutional power. And since *Maryland v. Wirtz* supplies neither of these missing elements it is not controlling and the broad language which disturbed the lower Court in this Case should be restated or overruled.

Governmental variety, the great strength of cooperative Federalism, cannot constitutionally be wiped out by calling it commerce and conferring unprecedented pervasive power upon one partner to the Federal system to take over the vital and intimate function of employee terms and conditions of employment of the other.

The elaborate treatment of Government in the Constitution indicates an intent to make certain Governments, as Governments, receive a higher status which would not allow functions of those Governments to be classified as commerce.

Wirtz is bottomed on the assumption that the amendments of 1966 worked no real Federal interference with the Government of States (392 U.S. at 193).

To extend the *Wirtz* doctrine to justify this complete takeover, one must abandon the principle that a rational basis for Federal legislation is more reluctantly found where to do so would force States and Cities to reduce or eliminate essential governmental service.

Admittedly, *Wirtz* condoned regulation of hospital and school employees competing with similar "enterprises" but without any firm analysis as to the ultimate impact on Federalism. In fact it appears to be denied by the exchange between the majority and dissent referred to above.

The focus of the Briefs and the majority opinion in *Wirtz* being on commerce, the threat that this initial Federal incursion presented to the integrity of constitutional Federalism received scant attention. Little, if any, analysis was given to the fundamental problem of preserving the careful governmental architecture of our Forefathers, while at the same time, giving proper recognition to the national free trade market embodied in the Commerce Clause. Given the absence of analysis, no balance was struck or attempted; and Federalism suffered at the hands of a legislative policy admittedly bottomed on a *de minimis* impact on commerce. The 1966 amendments' impact on State and local Government were, and are, not nearly as lethal as the potential governmental fiscal dislocation emanating from the 1974 Amendments.

As against the principles of our Federal system of Government, *Maryland v. Wirtz*, if interpreted to deny those principles, cannot stand. The programs and cooperative mutual respect of Federalism as sketched out in this Brief is not a picture of commerce in action but of Government in action.

IV.

The 1974 Amendments here challenged are bottomed on the Commerce Clause, which has been construed as a broad grant of power to the Congress to maintain and preserve a national free trade market, *Gibbons v. Ogden*, 9 Wheat. 1. Against this goal, this Court in considering challenged commerce legislation, has balanced the impact of the regulatory legislation in finding a rational basis for congressional action. *United States v. Carolene Products Co.*, 304 U.S. 144, 152. The "presumption" of constitutionality weakens as the legislation impacts a fundamentally protected right "within a specific prohibition of the Constitution, such as those of the first ten amendments. . .", *Carolene Products, supra*, 304 U.S. at 152 n. 4. This requirement of a higher-than-rational basis, commonly applied by this Court to legislation challenged on equal protection grounds, is as applicable to this challenge based on Fifth Amendment Due Process, See *Bolling v. Sharpe*, 347 U.S. 497, 499, especially here where the fundamental right of Federalism is preserved, not only in the Tenth Amendment, but in the 114 times throughout the Constitution's text where special provision is made for States. Private industry, the object of the Fair Labor Standards Act until the 1974 Amendments here challenged, depends on congressional grace when Congress acts rationally within the commerce power. The Constitution demands more for States and local Governments. *Polish Nat'l Alliance v. Labor Board*, 322 U.S. 643, 650 (dictum).

This Court has not been asked before to apply a higher-t[illegible]n-rational basis test to congressional legislation usurping State and City control of State and City Government; this was not done in *Maryland v. Wirtz*,

392 U.S. 183. But *Wirtz*, itself wrongly decided, is not this Case: this Case, for the first time before this Court, involves a congressional assertion of total power over the terms and conditions of employment of all Government employees, through whom States and Cities act for the people; these 1974 Amendments are an unconstitutional congressional assertion of power to control State and City Government itself.

V.

The Tenth Amendment did not create the Federal system of Government. The Constitution had already done that. The debates at the Constitutional Convention, the Constitution there produced, The Federalist papers, the debates at the State ratification Conventions all so establish.

The Federal system of Government is imbedded in the whole of the Constitution. To justify damage to that system, or violation of its principles designed to prevent centralization of the governmental functions of State and local Governments the Congress must enact legislation which meets a much higher constitutional standard than the traditional rational relation test.

Commerce in a national free trade market is important but so is our Federal system of Government. Protecting that system of Government is more important than protecting commerce, as that governmental system must in turn protect commerce. That system includes not only State powers and the People's [redacted] powers under the Tenth Amendment. It includes protecting Federal Government powers and not allowing the

system to break down by the excesses which Hamilton in the FEDERALIST said this Court would strike down as unconstitutional.

The Case for unconstitutionality is based on the whole of the governmental scheme of the Constitution, before the Tenth Amendment was adopted as well as the language of the Tenth Amendment. Certain it is that the Tenth Amendment is an important part of the Constitution which this Court must implement by enforcing its purposes which are to make clear that "absorption of legislative power by the United States over every activity", *Polish National Alliance v. Labor Board, supra,* 322 U.S. at 650 is a violation of the Constitution.

The 1974 Amendments do not meet the higher-than-rational test or even the traditional rational test. They violate not only Federalism, they violate the Tenth Amendment.

VI.

The 1974 Amendments here challenged went into effect against States and Cities on May 1, 1974; the effective date of provisions covering police and fire personnel was deferred to January 1, 1975. A reading of the 1974 Amendments makes clear that in them Congress asserts the power to control the terms and conditions of employment of all State and local Government employees, with minor exclusions. That certain exemptions are granted by congressional grace, as for supervisory personnel, in no way diminishes the congressional assertion of control over City and State

Government. C.f., the Internal Revenue Code of 1954, 26 U.S.C., and especially 26 U.S.C. §61.

Interpretation of exemptions from the coverage of the Act of either wages, or hours, or both, phrased very generally by Congress in amending the Fair Labor Standards Act many times, has been provided by regulations issued by Appellee and his Administrator of Wages and Hours. These regulations comprise 691 pages of a volume of Title 29 of the Code of Federal Regulations, and are admittedly 85% inapplicable to Government with its particularly stylized operation developed over 200 years of operation under our Federal system. Yet, with the exception of police and fire regulations, regulations designed for private industry were the only guidance for State and City Government to comply with this attempted congressional takeover of their Government functions.

Appellee on December 20, 1974, issued regulations of tours of duty, sleeping and eating time and overtime, which radically changed State and local law and traditional practices for police and fire fighters. The treatment in the regulations of sleeping and eating time, 29 C.F.R. §553.15, was not only in conflict with State and local law and practice but in conflict with congressional representations. These regulations were to go into effect January 1, 1975.

The regulations were issued by being printed in the Federal Register of December 20, 1974, which due to the Christmas holidays meant that actual receipt of that issue was some days later. This reduced the time for action under the regulations prior to their effective date to even less than the 6 business days provided on paper.

This meant that it was impossible for States and Cities to give notices required by law, assemble legislators and councilmen, and amend laws and budgets to bring them into compliance with the regulations. Such action made it impossible to comply with these regulations and rendered them void as in violation of due process.

VII.

As with the Tenth Amendment, the Eleventh Amendment did not create the Federal system of Government but rather recognized a system already guaranteed by the Constitution. Hamilton indicated in FEDERALIST Paper No. 81 that States as partners in Government would be immune from suits brought against them without their consent. When that principle was endangered by the decision in *Chisholm v. Georgia*, 2 Dall. 419, both the Federal and the State Governments cooperated to preserve the sovereignty of the States through the Eleventh Amendment.

The 1974 Fair Labor Standards Act Amendments represent a Federal fiat eliminating the Eleventh Amendment without the express or implied consent of the States. Of course, no express consent was offered by or obtained from the States. Furthermore, it would be ludicrous to twist any doctrine of implied consent to fit the present case by forcing a State to choose to discontinue employment of personnel or consent to suit. Nor should the doctrine allowing the Federal Government's suit against a State in vindication of a constitutional right be here distorted to allow the Federal Government's enforcement of a private citizen's private cause of action against a State in Federal Court.

ARGUMENT

1. The 1974 Amendments Conflict With Nearly Two Hundred Years of Federalism, Our Federal System Of Government, The Partnership of State and Federal Governments In Sharing Governmental Powers.

a. The Framers of the Constitution envisioned a Federal system of Government, a constitutionally protected partnership.

Since the 1974 Amendments here challenged are the Congress' first attempt ever to regulate the whole of an essential Government function, control of terms and conditions of employment, for all eleven million State and local Government employees, this Case involves all of our Federal system of Government as laid out in the Constitution of the United States. States and local Governments engage in a vast number of governmental functions from operating airports to public housing, police and fire protection, tax collection and zoning. In each instance, they act through employees who are reached by these 1974 Amendments. (Complaint ¶16, App. 16).

Here, as the Congress attempts to make this startling new takeover of a State and local Government essential governmental function -- control of State and local Government employees – it seems most appropriate that we examine at least in broad historical perspective, our entire constitutional scheme, our entire dual-shared power concept, as applied to our Government system which is usually labelled "Federalism". Since this is a case of first impression, a revisit to

the views of the draftsmen of our Constitution is illuminating.

Any careful study of the genesis, creation and interpretation of the Constitution of the United States makes clear that its paramount purpose in the field of intergovernmental relations was to establish this dual or Federal system of Government. State Governments were in being and the Constitution's plan for Federal Government powers was drafted with this major fact in mind. This fact is clearly a major part of the design of the Constitution. The famous "Virginia Plan", "New Jersey Plan", "Connecticut Compromise", and in fact the substance of the debates and votes at the Constitutional Convention, as so carefully recorded by Madison, are irrefutable proof of this purpose.[26] The views of Hamilton, Madison and Jay in THE FEDERALIST papers furnish confirmation.[28] The State by State debates on ratification of the Constitution are further confirmation.[28]

And while the State debates are a massive presentation of an understanding that State governmental powers and the ultimate power of the People would be further protected by an amendment embodying the

[26]J. Madison, NOTES OF DEBATES ON THE FEDERAL CONVENTION OF 1787 (Norton ed. 1966); Warren, THE MAKING OF THE CONSTITUTION (1928); Smith, THE CONVENTION AND THE CONSTITUTION (St. Martins 1965)

[27]THE FEDERALIST (Mentor ed. 1961); In No. 39, Madison states: " . . . the new constitution will, if established, be a federal and not a national constitution."

[28]4 Elliott, DEBATES ON THE FEDERAL CONSTITUTION (1836) 177, 242, 244, 406, 545, 550, 625, 629.

principles of the Tenth Amendment, it is clear from the sources cited that even without such an amendment those who wrote the Constitution were unanimous in their view that the "Federalism" principles contained in the Constitution *prior* to and without the words of the Tenth Amendment guaranteed essential non-interference by either Federal or State Governments with the essential governmental powers of each. The decision here must therefore consider the whole of the Constitution to correctly evaluate the powers, functions, and cooperative "Federalism" thereby created.

Hamilton's iew that this Court would strike down as unconstitutional any governmental excesses of power,[29] as enunciated later by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, was not seriously disputed. And while Hamilton's nationalistic stance and Madison's federalistic stance have provided grist for great constitutional debates to this day, no constitutional scholar of substance has ever denied that the Constitution created a Federal system of Government. Nor has anyone seriously denied this Court's umpire role in cases of power conflicts.[30]

And just as this Court's umpire role is implied from the whole of the scheme of the Constitution, so too is Federalism. The specific power authorizations to the Federal Government, the negative power prohibitions to the State Governments were all a part of the Constitution's Federalism design.

[29]THE FEDERALIST NO. 78 (A. Hamilton), *supra*, note 2, at 466-472.

[30]H.M. Hart and H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

The question presented here is not just one of protection of State governmental power as sloganized under the term "states' rights". The question here is one of protection of our Federal system of Government against the centralization of power the Constitution was designed to prevent. To reduce State and local Governments to the inferior status of reporting to and being governed by a Federal agency on such an important, ultimate internal matter as terms and conditions of employment of all employees is not envisioned by the Federal partnership system.

Here the Congress by these 1974 Amendments has overstepped constitutional bounds; its action violates both the spirit and the letter of the Constitution. It is this Court's duty so to hold and thus to preserve Federalism as envisioned and embodied in the Constitution by the Founding Fathers.

While the entire constitutional scheme is carefully laid out to insure Federalism as a system of Government, the Tenth Amendment is designed to protect the State Governments' traditional powers and the People's power as the ultimate primary source of all powers.[31] And while Federalism is not dependent upon the Tenth Amendment as Federalism was written into the design of the original Constitution, one cannot ignore the Tenth Amendment as a guarantee to the People and to the States of State governmental powers

[31]The 1974 Amendments here challenged usurp control of State and City Government from State and local officials responsible by election to the people; this power is given to unelected Federal employees responsible to no electorate.

or as a guarantee to the People of their paramount power.[32]

> "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." THE FEDERALIST No. 46 (J. Madison).

It would serve no useful purpose to detail the some 114 references to the States in the Constitution and explain the importance of each. The decisions of this Court have done that repeatedly with respect to the major constitutional references to the States. We do cite cases in this Brief to establish that this Court has consistently recognized Federalism as a basic concept of our system of Government. Here this Court is called upon for the first time[33] to interpret what our Federal system of Government means when the Congress moves in to regulate and clamp controls on the entirety of State and local Governments as Governments. This is greatly different from cases where the Tenth Amendment was interposed (unsuccessfully of late) in a conflict where both State and Federal Governments sought to regulate commerce by some private industry or entity.

Under "Federalism" for example, Federal postal drivers have been held immune from State driver's license requirements, which was seen as a State attempt to regulate the Federal Government as a Government. *Johnson v. Maryland* 254 U.S. 51, 57, in *Miller v.*

[32]See Costo, *The Doctrinal Development of the Tenth Amendment,* 51 W. Va. L. Rev. 227 (1949); Cowen, *What Is Left of the Tenth Amendment* 39 No. Car. L. Rev. 154 (1961).

[33]See *supra* pages 26-30.

Arkansas, 352 U.S. 187 (per curiam) a State licensing requirement for control was similarly rejected. In both cases a presumption was raised that the Government interfered with was adequately performing its licensing and certification function, a function which would be "frustrated", *Miller*, 352 U.S. at 190, by intergovernmental interference.

In *Mayo v. United States*, 319 U.S. 441, 447, a State inspection fee was invalidated as applied to fertilizer shipment and sales by the United States; permissible taxes, such as on salaries of employees or purchases by suppliers were distinguished, the Court saying:

> "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required *before executing a function of government.*" (emphasis added).

In our Nation, Governments are bundles of law powers. Governments act only through their employees. One of their most vital internal and intimate governmental functions is, therefore, the terms and conditions of employment that they prescribe for their employees. "No more vital internal function of government exists for States and cities than control of their employees and the budget items relating to said employees." Complaint ¶36, App. 25) In fact, salaries of City employees make up 80 to 85% of each City budget. (Pritchard Deposition at 125-126, App. 170-71). States and local Governments now have fair and reasonable terms and conditions of employment for their employees designed *for their unique needs.* (Complaint ¶¶19, 21, App. 17). The Federal Government does not

possess all the knowledge, wisdom, fairness and reasonableness in the exercise of this essential governmental employment function for State and local Government.

The impact of these Amendments on intergovernmental relations is devastatingly enormous. As is made clear in the Complaint and Record herein, the 1974 Amendments wipe out State and local civil service, budget, debt and other laws in a way never contemplated by the framers of the Constitution when they inserted the commerce power into that basic governmental charter.

State Governments free from Federal control are a paramount constitutional purpose, a purpose higher than any commerce impact they may make. Governments and the national free trade market envisioned by the Constitution were to coexist.

The 1974 Amendments fundamentally alter the distribution of governmental powers between the States and Federal Government thus destroying the very nature of our Federal system of Government by this usurpation through attempted Federal control over purely governmental organs and actions of State and local Governments.

In the decisions of this Court, one can trace most of the significant social, political and economic trends and developments of our Nation. Many of these cases have involved a decision whether the Federal or State Governments have power to act.[34] In the cases up to now the action so judged is largely regulation by Federal or State Governments of private persons or

[34] See Hart and Wechsler, *supra* note 30.

corporations.[35] Appellants urge that Government regulation of Government violates the constitutional principles of "Federalism" and is therefore unconstitutional.

This Act's 1974 Amendments are repugnant to the entirety of the Constitution of the United States. The Constitution enunciates a system of Government under which the Federal Government and the State Governments each perform Government functions appropriate to their assigned roles in our federalized system, with each Government respecting the role of the other and this Court acting as ultimate arbiter in case of conflict.

No act adopted by the Congress has ever before even attempted to directly control, regulate, take over or interfere with and impinge directly upon the whole of the employees and thus the whole of the governmental functions of State and local Governments *qua* Governments as substantially as do the 1974 Amendments here challenged.

The whole of State and local Government functions were not intended to be classified as commerce under any reasonable interpretation of the Commerce Clause of the Constitution which was inserted to enforce a national free market for trade. The Commerce Clause

[35]See, e.g., *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1943) (the steel industry); *United States v. Darby*, 312 U.S. 100 (the lumber industry); *Wickard v. Filburn*, 317 U.S. 111 (the wheat market); *United States v. Wrightwood Dairy*, 315 U.S. 110; *United States v. Carolene Products Co.*, 304 U.S. 144 (the dairy industry), *Heart of Atlanta Motel v. United States*, 379 U.S. 241; *Katzenbach v. McClung*, 379 U.S. 294 (public accommodations).

should not provide the Federal Government with a slick gimmick to take over and regulate State and local Governments.

In *Craig v. Missouri*, 4 Pet. 410, 433, the Court considered attempts by a State to issue money under the label of "bills of credit"; commenting on this perversion of word meaning, Chief Justice Marshall said:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so."

And so here the adoption by the Congress of these 1974 Amendments where "Government" is called "commerce" so that the Federal Government may regulate State Government is "great and ruinous mischief" to evade the Constitution's failure to give power to the Federal Government to so regulate State Governments.

The 1974 Amendments have no rational basis in the Commerce Clause as properly defined in relation to Governments. The Constitution's Framers defined Government through many grants and prohibitions of power; they operated on assumptions based on State Governments in being.

"Federalism" looks to the entire Constitution as its constitutional basis. The Tenth Amendment is an additional and a specific bar to the takeover of State and local Government functions by the Federal

Government under the 1974 Amendments. The respect of the Congress for State governmental functions and powers has been so great throughout our Nation's history as to prevent any previous takeover legislation as pervasive as that here challenged. The constitutional mistake here made by the Congress in imposing this Act upon States is clear and must be corrected by this Court.

b. The first Congress memorialized a constitutionally protected partnership system between Federal and State Governments, in part through State powers specifically embodied in the Tenth Amendment, in addition to the other parts of the Constitution creating our Federal system of Government.

While the Federal system of Government is spelled out in the whole of the Constitution stating the Federal Government's part in that system and imposing certain restrictions on both the Federal Government and State Governments, a provision similar to the Tenth Amendment, reserving to the States those powers not delegated to the Federal Government, was recommended by all eight of the States which, in ratifying the Constitution, proposed various amendments.[36] In fact, a commitment to present such a provision as an Amendment was promised to secure ratification of the Constitution.[37] The provision which ultimately became the Tenth Amendment was included, therefore, in the first proposal of amendments to the Constitution, introduced in the House of Representatives by James

[36] 2 B. Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983 (1971).

[37] *See* Schwartz, *Ibid.*, and Elliott, *supra*, note 28.

Madison.[38] The proposed amendment stated, "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."[39] This provision was retained by a select committee of the House chosen to consider and report on the amendments proposed by Madison and by the States.[40]

Debate on the amendment in the House of Representatives was brief. Twice, motions to add "expressly" before the word "delegated" were defeated.[41] James Madison, objecting to the changed wording, stated that "it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to account every minutiae."[42] Two other motions changing the wording of the amendment to that finally adopted were agreed to without debate,[43] and the proposed amendment was passed without further discussion.[44]

While the full Senate debates on the Bill of Rights are unreported, the Senate Journal shows that the Senate rejected a similar proposal to add the word "expressly" before "delegated".[45]

[38] 1 Annals of Cong. 436, 441 (1789).

[39] *Id.* 436.

[40] *Id.* 761.

[41] *Id.* 761, 767-68.

[42] *Id.* 761.

[43] *Id.* 761, 768.

[44] *Id.* 768.

[45] 2 Schwartz, *supra* note 36, at 1150-51.

The Bill of Rights was proposed and then approved by the First Congress on September 25, 1789, and ratified by three-fourths of the States on December 15, 1791.[46]

c. This Court has preserved the constitutionally protected Federal system of Government, of Federal and State partnership.

The basic pattern of Federalism, of Federal-State cooperative intergovernmental relationships, and shared governmental powers, is reflected in the decisions of this Court which consider the whole structure and dynamics of the State and Federal law systems in drawing lines of demarcation between Federal and State governmental powers.

As this Court said in *Ex parte Siebold*, 100 U.S. 371, 394, in upholding concurrent Federal-State regulation of elections:

> "The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution . . . "

This Court considered in *Ex parte Kentucky v. Dennison*, 24 How. 66, a Federal statute imposing a "duty" on State executives to extradite criminals. Construing the statute as permissive rather than mandatory, the Court said:

> "The Act does not provide any means to compel the execution of this duty, nor inflict any

[46] *Ibid.* 1165

> punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. *Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights.* And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer as such, any duty whatever, and compel him to perform it; for if it possessed this power, *it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State*, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 24 How. at 107-108 (emphasis added).

The 1974 Amendments overload the officers of each State and City with burdensome and expensive dual record-keeping and personnel scheduling chores mandated by those Amendments. These are in addition to State and City record keeping, personnel processing and other reporting. These federally ordered chores, to be used only to aid Federal usurpation of State and City personnel systems, violate constitutional Federalism.

In *Lane County v. Oregon*, 7 Wall. 71, a State statute requiring payment by a County to a State in coin (not in U.S. notes) was upheld, the Court saying:

> "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with

powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well expressed by Mr. Madison in the Federalist, thus: 'The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes'." 7 Wall. at 76.

The area in which this Court has most commonly been called upon to preserve the constitutionally protected Federal partnership is intergovernmental tax immunity. This Court has distinguished from areas of State activity which are federally taxable,[47] the immune functions "without which a state could not continue to exist as a governmental entity." *Helvering v. Gerhardt*, 304 U.S. 405, 418. C.f., *New York v. United States*, 326 U.S. 572, 582, and 326 U.S. at 588 (Stone, J., concurring).[48]

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[47]See, e.g., *South Carolina v. United States*, 199 U.S. 437, and *Ohio v. Helvering*, 292 U.S. 360 (liquor sales).

[48]That the majority opinion in *Maryland v. Wirtz*, 392 U.S. 183, could avoid mentioning the tax case of *New York v. United States*, 326 U.S. 572, which the dissenting opinion found "echoed" in *Wirtz*, 392 U.S. at 202-203, is explained by the failure of this Court in *Wirtz* to distinguish the relative positions of the Federal and State Governments in regulating private industry, from the protected position of States in operating State Government itself. See page 123, *infra*.

In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-24, this Court said:

> "*But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.* Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied nor extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." (emphasis added).

The cases of *Helvering v. Powers*, 293 U.S. 214, *Helvering v. Gerhardt*, 304 U.S. 405, and *Graves v. New York*, 306 U.S. 466, upheld Federal taxation of the salaries of employees of States or State-owned corporations. Each must be read in light of the finding of the effect of the tax there upheld on State Government operation.[49]

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[49]In *Alabama v. King & Boozer*, 314 U.S. 1, a State sales tax paid by a contractor was upheld against a claim of Federal immunity where the Federal Government had entered into a "cost plus" contract with the contractor and ultimately bore the incidence of the tax. The case turned on the question whether the Federal Government could be interpreted as the "purchaser" of lumber used in the construction within the State statute, the Court holding the Government was not the "purchaser". Therefore, the Court's statement, 314 U.S. at 8-9:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be

In *Powers*, the street railway, the salary of whose Trustees was held subject to Federal income taxation, was described by the Court as "intended to be self-sustaining . . . 'under such a flexible system of rate making as would allow the fixing of fares equal as nearly as might be to the cost of service.' The compensation of the trustees is undoubtedly a part of that cost." 293 U.S. at 223.

In *Gerhardt*, the Court found "that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." 304 U.S. at 424.

In *Graves*, the Court made no finding that a tax (here a State tax of a Federal corporation) by one Government would have a deleterious effect on the operation of the other Government. The Court dealt in the abstract, with "assumptions" and "implied constitutional immunities". 304 U.S. at 486.

Furthermore, in these cases the assertion of immunity from Federal taxation involved a burden on Federal Government operation which is not present in the limitation of unconstitutional Federal interference by regulation. The Court in *Gerhardt, supra*, 304 U.S. at 421, said:

> "The effect of the immunity if allowed would be to relieve respondents [employees] of their duty of financial support to the national government in

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free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox*, [277 U.S. 218]; *Graves v. Texas Co.*, [298 U.S. 393], is dictum we think it no longer tenable."

> order to secure to the state a theoretical advantage so speculative in its character and measurement as to be insubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far."

See also, *Helvering v. Powers*, 293 U.S. at 225.

This Court in *United States v. California*, 297 U.S. 175, 184, declared that State immunity from Federal taxation is "implied from the nature of our federal system. . . ."

In *United States v. Baltimore & O.R.R.*, 17 Wall. 322, 327-328, Federal imposition of tax on interest received by a City on railroad bonds was denied, a municipal corporation taking the immunity of the State from federal taxation. The Court there said:

> "The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. *The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization.* This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other." (emphasis added).

See also *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583-584.

The Court in *New York v. United States*, 326 U.S. 572, 576, said the Congress may not "do violence to the presuppositions derived from the fact that we are a Nation composed of States." The Justices of the Court continued in their separate opinions:

> "There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations.*** These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State." *Id.* at 582. (opinion of the Court by Frankfurter, J.).

> "All agree that not all of the former immunity is gone." *Id.* at 584 (Rutledge, J., concurring).

> "[A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587 (Stone, C.J., concurring).

> "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *Id.* at 594 (Douglas, J., dissenting).

This analysis of constitutionally protected essential State governmental functions is as applicable to the commerce power as it was to the taxing power. In each instance a direct Government-on-Government burden is unconstitutional.

The Twenty-first Amendment, ratified after the Commerce Clause as was the Tenth Amendment, has been held to supersede the Commerce Clause, permitting State

license fees for the importation of alcoholic beverages, which before the Amendment "would obviously have been unconstitutional. . . ." *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62. See also *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U.S. 391, 394.

d. The Federal Government, even today, operates under this constitutionally protected Federal system partnership.

1) The Federal Government cooperates with, or defers to, State and City regulation of private industry.

Federalism – the shared governmental powers system of our Nation – requires many mutual accommodations, or comity, among Federal, State and local Governments with each Government performing that governmental service it can best perform.

The Federal Government has recognized the special expertise and the appropriateness of State and City regulations of matters of local concern. For example, in *Cable Television Report and Order*, 37 Fed. Reg. 3252 (Feb. 12, 1972) at ¶177, the Federal Communications Commission admits:

> "*Dual Jurisdiction*. The comments advance persuasive arguments against Federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for

example, as how best to parcel large urban areas into cable districts. Local authorities are also in better position to follow up on service complaints. Under the circumstances, a deliberately structured dualism is indicated; the industry seems uniquely suited to this kind of creative federalism."

It is difficult to see a rational basis for the Congress' acting contrary to this policy in usurping, through the 1974 Amendments, State and local expertise in prescribing terms and conditions of employment of their own employees through whom States and Cities provide their essential Government services.

Federal-State cooperation was the method chosen by Congress, in the Social Security Act of 1935, Title IX, c. 531, 49 Stat. 620, to provide unemployment benefits; this was upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585; the same cooperative effort in the generation of electricity was upheld in *Alabama Power Co. v. Ickes*, 302 U.S. 464, 476-477 (" 'Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of [the Federal Government] . . . ' ").

An amendment to the National Labor Relations Act provides that States may act in situations where the Labor Board declines to act for reasons of size or otherwise. Act of June 23, 1947, c. 120, 61 Stat. 146, 29 U.S.C. § 160(a) (1970).

The "Federal-State" amendments to the Atomic Energy Act allows the Atomic Energy Commission to enter into agreements with Governors of States to discontinue AEC regulatory powers over certain materials to protect health and safety from radiation

hazards. Section 1 of Pub. L. No. 86-373, 73 Stat. 688, 42 U.S.C. § 2021 (1970).

Even concerning a congressional power so broad as the war power, this Court has rejected the argument that all power is in the Federal Government, favoring the view that "the constituted and constituting sovereignties must have power of cooperation against the enemies of all" *Gilbert v. Minnesota*, 254 U.S. 325, 329. See also, *Hamilton v. University of California*, 293 U.S. 245, 260.

Many other examples of cooperative Federalism could be cited,[50] but these illustrations indicate its enormous value and the damage which could flow from its destruction. There are hundreds of Federal programs (a few examples of such programs are found in the Catalog of Federal Domestic Assistance (7th ed., Ofc. of Mgmt. and Budget 1974)) which require participation by the States and their political subdivisions.

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[50]See, e.g., Section 15 of the Meat Inspection Act of 1967, Pub. L. No. 90-201, 81 Stat. 595, 21 U.S.C. § 661 (1970); Sections 706(b) and 708 of Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259, 42 U.S.C. § § 2000e-5(c), 2000e-7 (1970); Section 6(c) of Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107, 42 U.S.C. § 2000e-8(b) (Supp. III 1973); Section 5 of the Wholesome Poultry Products Act of 1968, Pub. L. No. 90-492, 82 Stat. 796, 21 U.S.C. § 454 (1970); Title V of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 88 Stat. 742, 30 U.S.C. § 953 (1970); see also, the Federal Water Pollution Control Act, 33 U.S.C. § 1151 *et seq*. (1970), as amended, 33 U.S.C. § 1251 *et seq*. (Supp. III 1973); Clean Air Act, 42 U.S.C. § 1857 (1970, as amended, Supp. III 1973); Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq*. (1970).

Until now the Federal Government has worked cooperatively to improve the status of State and local Government personnel.

Adoption of the National Intergovernmental Personnel Act (Pub. L. No. 91-648, 84 Stat. 1909, 5 U.S.C. §§1304, 3371-3376; 42 U.S.C. §§4701, 4702, 4711-4713, 4721-4728, 4741-4746, 4761-4772 (1970)) provided Federal technical and financial assistance in training State and local personnel to improve their merit systems. The United States Civil Service Commission may make grants up to 75% of training costs.

Cooperative Federalism has flourished in our Nation due to mutual respect of Governments. This cannot be if one Government is seeking to control an element as vital as personnel management of the other.

The Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577, 82 Stat. 1098, 42 U.S.C. §4201 *et seq.* (1970), and the Advisory Commission on Intergovernmental Relations created in 1959, Pub. L. No. 86-380, 73 Stat. 703, 42 U.S.C. §4271 *et seq.* (1970), provide the planning for enormous cooperative programs between the Federal, State and local Governments.

Numerous Executive Orders recognize the important governmental status of State and local Government. Circular No. 85-A issued by the Executive Office of the President on January 20, 1971 "to The Heads of Executive Departments and Establishments" mandates "Consultation With Heads of State and local Governments in developing of Federal Regulations" of interest to States and local Governments. In *New York v. O'Neill,* 359 U.S. 1, 6, this Court referred to

"increasing harmony within *the federalism created by the Constitution,*" (emphasis added), in upholding a voluntary agreement between States for attendance of witnesses at criminal trials. Reference was also made to "a constitutional division of powers." *Id.* at 10.

Cooperative programs carried out by Federal, State and local Governments have great value in considering the actual effect of the 1974 Amendments:

> "Testifying in 1966 before the Senate Committee on Governmental Operations, the then Director of the Budget, Charles L. Schultz mentioned that the preceding Congress had enacted twenty-one new health programs, seventeen new educational programs, fifteen new economic development programs, twelve new programs to meet city problems, four new programs for manpower training, and seventeen new resource development programs. These, he said, could have been shaped as direct operations of the central government, thus avoiding some difficult intergovernmental problems. But this course 'would not have led to effective solutions, since most of the problems which these programs attack are not the same nation-wide, and can only be solved in the context of widely different local conditions and requirements.' The soundness of this outlook is not denied by the fact that many national programs, when conducted wisely and with skill, can provide a good deal of experimenting and adaptation. On the whole, however, the case for acting indirectly through a variety of grants-in-aid is strengthened by the wholesomeness of local and regional variations as well as the frequent need for the collateral use of state governmental powers." A.W. MacMahon, ADMINISTERING FEDERALISM IN A DEMOCRACY 84-85 (1972).

Federalism has deepened the collaboration among levels of Government in the United States as grant-in-aid programs have grown.

These 1974 Amendments to the Act force State and local Governments into a uniform nation-wide mold.

In *United States v. Bekins*, 304 U.S. 27,54, the Court considered a bankruptcy statute passed to ameliorate the unconstitutionality of a former statute declared by the Court in *Ashton v. Water District*, 298 U.S. 513,530, to "materially restrict respondent's [political subdivision of a State] control over its fiscal affairs." In recognizing that such fiscal intrusion clearly would be unconstitutional, the Senate Committee on the Judiciary said in Senate Report No. 911, 75th Cong., 1st Sess., as the Court approved in *Bekins*, 304 U.S. at 51:

> "The bill here recommended for passage expressly *avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties.* No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. No involuntary proceedings are allowable, and *no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill* . . ." (emphasis added).

The statute upheld in *Bekins* was carefully drafted to avoid involuntary fiscal disruption of States, political subdivisions and Cities. The 1974 Amendments challenged here will produce exactly that effect: "restriction on the . . . states . . . in the exercise of their sovereign rights and duties."

In other areas, the Federal Government has recognized States and Cities as better able to regulate certain aspects of private industry. This Court has construed the intent of Congress to facilitate the greater ability of States and Cities to regulate local matters.

The Court in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, applied this balancing test to an area in which Congress was silent (fire insurance):

> "[T]he primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case the competing demands of the state and national interests involved can be accommodated." 322 U.S. at 548.

Accord, *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189; *California v. Thompson*, 313 U.S. 109, 114; *Parker v. Brown*, 317 U.S. 341, 362-363; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 ("... the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress"); *United States v. Bass*, 404 U.S. 336, 349 ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Heublein v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-282; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749; *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275.

Even the Age Discrimination in Employment Act, applied to States and Cities by the 1974 Amendments here challenged, contains in § 14[51] provisions for

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[51] Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. § 633 (1970).

Federal-State cooperation, which declare in relevant part:

> "(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action."

Federal recognition of the special position of State Government in our constitutional scheme is especially pervasive in the jurisdiction of Federal Courts. Rate orders by State bodies are preserved generally from Federal injunction,[52] a recognition of State expertise over local matters. Federal Courts abstain from constitutional questions which could arise only under an interpretation of State law which has not yet been made by State Courts. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501; and Federal Courts grant injunctive or declaratory relief against State criminal prosecutions only in extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37,41,49; *Samuels v. Mackell*, 401 U.S. 66, 69. Yet in the 1974 Amendments Congress has ignored State and City expertise and State and City law and decisions on terms and conditions of employment of their own Government employees as adapted to governmental needs and functions performed.

There are other areas of State action where the Federal Courts will not intervene such as probate of wills, administration of decedents' estates, divorce and intimate domestic relations like children's custody.

[52] 28 U.S.C. § 1342 (1970).

These are recognized as areas restricted exclusively to the State.[53]

2) The Federal Government, even more importantly, in recognition of the Federal system partnership, has exempted State and City Government from Federal regulations of private industry.

In recognition of their special status as Governments and the importance of preserving "Federalism", the Congress has exempted State and local Government from Federal regulations of private industry.

As was done in 1938 in the Fair Labor Standards Act,[54] Congress traditionally has written into labor and industrial legislation its recognition that Government is different from private industry and that State and City Government is not within regulatory reach of the Federal commerce power. The Social Security Act of 1935,[55] expressly exempts States, political subdivisions and their instrumentalities from Federal old age, survivors and disability insurance contributions. States and Cities are similarly exempted[56] from the National

[53] See Hart and Wechsler, *supra* note 30, at 1001-18.

[54] Section 3(d), 52 Stat. 1060.

[55] Sec. 811(b)(7), Act of August 14, 1935, c. 531, 49 Stat. 620, now 26 U.S.C. § 3121(b)(7) (1970).

[56] The Congress is presently considering usurpation of this area of State and City operation through amendment of the NLRA. H.R. 77, "A Bill to provide that employees of States and political subdivisions thereof shall be subject to the provisions of the National Labor Relations Act." introduced 121 Cong. Rec. H.13 (daily ed. Jan. 14, 1975).

Labor Relations Act,[57] and the Occupational Safety and Health Act.[58]

Other Federal legislation has expressly recognized the unique position of State and City Government, as not amenable to rules governing private industry. See, e.g., Section 3031 of the Employee Retirement Income Security Act of 1974;[59] see also H.R. Rept. No. 1280, 93d Cong., 2d Sess. 360 (1974) ("In studying whether the funding standards of the bill should be imposed on government [pension] plans, the study is to take into account the taxing power of the governmental unit maintaining the plan.")

Federal legislation has been construed by this Court not to treat State and City Government under rules applicable to private industry. Section 8 of the Sherman Act,[60] was so construed in *Parker v. Brown*, 317 U.S. 341, 351.

Section 308 of the Federal Regulation of Lobbying Act[61] exempts from registration requirements "any public official acting in his official capacity". The coverage of this regulatory act was found by this Court

[57]Sec. 101, Act of June 23, 1947, c. 120, 61 Stat. 137, 29 U.S.C. § 152(2) (1970).

[58]Sec. 3(5), Act of December 29, 1970, Pub. L. No. 91-596, 84 Stat. 1591, 29 U.S.C. § 652(5) (1970).

[59]Pub. L. No. 93-406, 88 Stat. 829, 42 U.S.C.A. § 1231 (Supp. 1974).

[60]Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. § 7 (1970).

[61]Act of Aug. 2, 1946, c. 753, 60 Stat. 841, 2 U.S.C. § 267 (1970).

in *United States v. Harriss*, 347 U.S. 612, 625, to be "special interest groups . . . masquerading as proponents of the public weal," clearly distinguishing States and Cities from private industry. The exemption of State and City public officials was recently declared to extend to full-time officers and full-time employees of organizations[62] of public officials who act solely on the authorization of a public official and who are paid from public funds. *Bradley v. Saxbe*, Civil Action No. 74-1327 (D.D.C. Dec. 18, 1974). Thus, employees of States and Cities are distinguished from employees of private industry, just as Federalism requires that States and Cities themselves acting in their capacities as Government be distinguished from private industries.

Just as this Court has construed the intent of Congress in order to preserve Federalism concerning State regulation of private industry,[63] so this Court has construed the intent of Congress to preserve State immunity from Federal incursion. *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279, 286.

e. Under this constitutionally protected Federal system partnership, States and Cities have fairly provided for wages and hours of employees in their Government operations.

As set forth in the Complaint, States and local Governments provide fair and reasonable terms and

[62]National League of Cities, National Association of Counties, and United States Conference of Mayors.

[63]*United States v. South-Eastern Underwriters Ass'n, supra*, 322 U.S. at 548.

conditions of employment according to the unique needs of each Government, including fair and reasonable wages and hours. These personnel policies and employment terms and conditions include civil service and other laws to protect employment rights of state and city employees. (Complaint ¶¶19-35, App. 17-25).

The power to prescribe the terms and conditions of employment for its employees is vital to the performance of State and local governmental functions.

At least 80% of the States authorize or permit collective bargaining by some or all of the above classes of employees. And at least 50% specifically authorize or permit such bargaining as to wages and hours. For the remainder of States with collective bargaining, bargaining on wages and hours may be assumed. See *supra* footnote 23.

In light of Federal revenue sharing,[64] the Advisory Commisssion on Intergovernmental Relations emphasizes:

> "... the importance of improving the productivity and personnel practices of state and local governments. Though productivity and improvements at all levels are desirable, increasing productivity at the state and local level where direct use of resources is concentrated would have the greatest fiscal impact." ACIR, TRENDS IN FISCAL FEDERALISM 3(1974).

Secretary of Labor James Hodgson said in opposing the imposition of Federal control over State and City labor union relations, *Hearings on H.R. 12532, H.R.*

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[64]State and Local Fiscal Assistance Act of 1972, Title I, Pub. L. No. 92-512, 86 Stat. 919, 31 U.S.C. § 1221 *et seq*. (Supp. III 1973).

7684, H.R. 9324 Before Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 281-83 (1972):

> "The States are taking advantage of this opportunity to adapt various public sector labor relations models to their local needs. The past six years has been a period of great activity in public sector labor relations at the State level. Not only have States developed various initial approaches to public sector labor relations, but they are refining and perfecting these approaches on the basis of their experience. For example. Wisconsin and New York have both amended their comprehensive statutes. Minnesota has replaced two 'meet and confer' laws with one collective bargaining statute. Connecticut is involved in a major legislative study of possible revision of its law. Thus, the States are not neglecting the problems of labor and management in the public sector. Rather than being detrimental as in the private sector, experimentation on a State-by-State basis in the public sector takes into account important State differences and contributes substantially to our understanding of the issues in public sector labor relations. This process of development should not be interrupted when there is no urgency for Federal legislation. Under these circumstances, variation rather than uniformity among the States is the more valuable pattern for policy development."

Across our Nation there are a wide variety of State and local governmental arrangements designed to provide maximum public services at the lowest public cost. Initiative in conception and execution, and *pro bono publico* volunteerism are trademarks of this variety. No people has developed *pro bono publico*

volunteerism more highly than at the local level in our Nation.

It is here where the impact of the 1974 Amendments causes the most damage. These Amendments force State and local Governments into a uniform nation-wide mold.

The history of State and local Government in this Nation has been one of flexibility, adaptation to change, and experimentation. Cities undergo cycles of growth and decline (Pritchard Deposition at 203-204, App. 224-25), requiring changes in personnel practices and adaptation of Government services. Cities experiment to obtain the most efficient and economical service. For example. Seattle trains its firefighters as building inspectors (Pritchard Deposition at 183-184, App. 211-12), a practice which will be penalized by the imposition of overtime under the "joint employment" regulation. 29 C.F.R. §553.9 (App. 608). Sunnyvale, California combines police and firefighters into public safety teams (Pritchard Deposition at 167, App. 200).

f. The Congress was aware of the variety of State and City governmental activity, under this Constitutionally protected Federal system of partnership; nevertheless the Congress usurped State and City control of their Government operation to force a uniformity foreign to our system of Federalism.

Two Secretaries of Labor have testified on the basis of a Labor Department study that States and Cities do not pay substandard wages. They opposed application of the Act to State and local Governments as an undue intrusion into their affairs. (See *supra*, pages 19-21). The

Advisory Commission on Intergovernmental Relations opposed the proposed legislation for the same reason. And the President of the United States vetoed Amendments similar to the 1974 Amendments for the same reason. See *supra*, page 21.

The legislative history, as already noted *supra*, does indicate that Congress had before it ample and competent evidence that extension of the Act to State and local Government employees was both unnecessary and in conflict with Federalism. House Report No. 913, 93d Cong., 2d Sess. 28 (1974) quotes a 1970 Department of Labor Study stating that "wage levels for State and local Government employees not covered by FLSA are, on the average, substantially higher than workers already covered" and that the "actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." Based on this Department of Labor Study, the House Report concluded that "the actual impact on State and local Governments then of a 40 hour standard, will be virtually non-existent," H.R. Rept. No. 913, 93 Cong., 2d. Sess. 29 (1974)

All of these facts were known to the Congress, yet it adopted the Amendments again and the President reluctantly signed them as the vote in the House and Senate indicated no possibility that a veto would be upheld. Byrley testified however that the States had expected another veto. (Byrley Deposition at 57, App. 284).

Cities extensively use volunteers who are paid a nominal sum, generally to qualify for workman's

compensation (Complaint ¶28, App. 21). For example, some 1,000,000 volunteer firemen[65] will be greatly affected by the 1974 Amendments. The 1974 Amendments will impose on Governments, burdensome recordkeeping requirements (Pritchard Deposition at 10, App. 92), as well as the indecision attending the removal of decisions about volunteer status to the Appellee in Washington (Pritchard Deposition at 120, App. 167). If a "volunteer" is determined by the Appellee to be covered by the Act, he must be paid full compensation. (Pritchard Deposition at 119-120, App. 166-67). This spectre has forced Randolph, New Jersey, for example, to abolish this innovative and economical practice. (Complaint ¶65, App. 34-35) (See also Pritchard Deposition at 154-155, 167-171; App. 191-192, 200-03).

Some State and local Government personnel practices are so foreign to the industrial setting of the Act that they are not dealt with by regulation or existing case law. For example, State and local Governments "employ", as that term is described in §3(g) of the Act, 29 U.S.C. §203(g), people if they "suffer or permit" them to perform largely voluntary or civically motivated activities and compensate them by way of a small stipend or nominal amount to cover expenses. While the intended police and fire personnel regulations, 29 C.F.R. §553 (App. 591-620) deal with this area for

[65]"About 1 million Americans serve as volunteer firefighters, five times the number of paid firefighters in the Nation." AMERICA BURNING: THE REPORT OF THE NATIONAL COMMISSION ON FIRE PREVENTION AND CONTROL (1973). This Report concludes that it will cost local Governments 4.5 billion dollars annually to replace volunteers with paid firefighters.

public safety employees,[66] the subject is nowhere else treated for other Government employees. Under the Act, absent any interpretation by the Wage and Hour Division, State and local Governments must either entirely eliminate the nominal payments or pay the wage required by the Act. Local Governments who cannot afford to pay that wage must cancel the programs. This concept of "paid volunteers" is used by local Governments not only for firefighters and police, but also for employing poll workers in elections, and for implementing parks, recreation, and other Government projects for involvement of the young, elderly and disadvantaged in the community.

In like manner, 29 C.F.R. §791 regulates and severely restricts use of joint employment arrangements unless the employee is compensated at an overtime rate for hours worked over 40 in a workweek. Because of the variety of services which State and local Governments provide, many Government employees who augment their income by part-time jobs in other areas of the Government may now lose their second jobs because of the inability of their employer to pay the requisite overtime compensation for their second job. Whatever basis such requirements have in private industry is clearly inapplicable here, since State and local Governments may not readily pass added costs on to the "consumer" - their citizens, including their employees.

The traditional use of compensatory time off has

[66]For police and fire personnel, the Appellee's Administrator of Wages and Hours has already determined that payment averaging more than $2.50 per call precludes "volunteer" status. 29 C.F.R. § 553.11 (App. 611).

allowed State and local Government employers to deal with the peak employment problems encountered by many of the duties thrust upon them. Unlike a corporation, Government is not free to perform or not perform these duties. It must perform them, and do so at the least cost to its citizens. Employees favor the concept of compensatory time off in that it gives them more freedom and flexibility in choosing time off and it gives them more time off. Because they are paid a regular amount each payday even when taking compensatory time off, they are "guaranteed" against seasonal layoffs. Compensatory time off beyond the workweek is prohibited under 29 C.F.R. §778.106 and must be discontinued if the Act is upheld.

The discontinuance of compensatory time-off and the requirement that overtime be paid will conflict with State law. For example, the Arizona Supreme Court in *State v. Boykin*, 109 Ariz. 289, 293, 508 P.2d 1151, 1155 (1973), declared that, while compensatory time off was constitutionally permissible for State and political subdivision Government employees, overtime could not be paid. (See Complaint ¶22, App. 18).

Compensatory time off is used extensively in State and City Government. For example, Salt Lake City accumulates 7000 hours annually for snow removal alone, which, under the 1974 Amendments must be paid for in cash as overtime. (Complaint ¶49, App. 29-30. Pritchard Deposition 61-70, 105; App. 126-133, 157-58).

The effect of this congressional disregard for the unique nature of State and City Government by the challenged 1974 Amendments will be tremendously adverse to the States and Cities, as well as to the

interest of the Federal Government in carrying out Federal-State cooperative programs.

Each State and local Government until now has had wide scope in deciding its governmental form and procedures to meet its peculiar needs. All kinds of nominally paid or purely volunteer Boards and Commissions have operated everything from airports to zoning. Now apparently, members of many of these Boards, if paid anything, must be paid at least the minimum wage and all kinds of records kept and reports filed with the Department of Labor.

From the sturdy New England towns to Western crossroads which became towns as the law became viable, vast individualistic volunteerism has kept Government costs and taxes low.

We could have, in principle, a perfect uniformity of law in the United States - at a price. We could have it by establishing a single legislature, a single system of courts, a single chief executive, and a single phalanx of executive departments and administrative agencies, each possessing within its sphere a nation-wide and general jurisdiction.

The Federal Government has avoided the rigidity which the Congress seeks to impose on States and Cities. The Civil Service Commission's objection to control by the Labor Department of Federal Government employees' terms and conditions of employment[67] was accepted in the 1974 Amendments;[68] implementa-

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[67]See S. Rept. No. 690, 93d Cong., 2d Sess. 23 (1974); H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 28 (1974).

[68]Section 6(b) of Pub. L. No. 93-259, 88 Stat. 60, *amending* 29 U.S.C. § 204.

tion of the Fair Labor Standards Act coverage of Federal employees was committed to the Civil Service Commission.

The General Accounting Office, an agency of Congress, and the Civil Service Commission, charged with enforcement of some aspects of the 1974 Amendments, have concluded that this Act was wrongly enacted and should be amended. A recent GAO Report to Congress on LEGAL LIMITATIONS ON FLEXIBLE AND COMPRESSED WORK SCHEDULES FOR FEDERAL EMPLOYEES (B-179810, Oct. 21, 1974), indicates that while Defendant's Wage and Hour Division is acting to retard progress and diversity in flexible scheduling of both Federal and State and local employees, the Comptroller General feels that such flexibility increases morale and productivity and reduces absenteeism in Federal employees. In recommending that the Chairman of the Civil Service Commission "seek legislation to amend . . . FLSA, as amended, to permit testing of flexible and compressed work schedules", the Report conclusively states that:

> "Work schedules in the Government should be established on the basis of the needs and objectives of the work to be performed rather than on a predetermined and inflexible workday. . . . Those Federal activities which have piecemeal experimentation with altered schedules have. . . reported benefits. *In our opinion, altered schedules can be applied to selected Federal activities with resulting benefits to the Government, its employees, and the public.*
>
> "There have been no comprehensive tests of altered work schedules in the Federal Government. Current law limits the flexibility of Federal

> managers and employees to test new work schedules." (*Id.* at 17) (emphasis added).

The Congress in fact made no adequate study of the impact of the 1974 Amendments and seemingly acted largely upon the false representations of no impact. See *supra*, footnote 21.

Preventing the danger of centralization of Government which would destroy Federalism is the paramount purpose of the Constitution, and it was designed to prevent such centralization. Common sense and the instinct for freedom alike can be counted upon to tell the American people never to put all their eggs of hope for governmental problem-solving in one governmental basket. Such prevention is more important constitutionally than the prevention of slight governmental impacts on the concept of a free national trade market.

In *McCulloch v. Maryland*, Chief Justice Marshall said: "[N]o political dreamer was ever wild enough to think of breaking down the line which separates the States, and of compounding the American people into one common mass." 4 Wheat. 316, 403.

But dream they did in the 93d Congress, and the most egregious result (at least from the view point of constitutional Federalism) was the Amendments of 1974.

James Madison, for one, was convinced that a second American Revolution would inevitably erupt if the pressure for centralized power ever resulted in an attempt to usurp the sovereignty to be constitutionally guaranteed to the States, when he wrote in THE FEDERALIST, No. 46:

> "But ambitious encroachments by the federal government on the authority of the State

governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse a common cause. A correspondence would be opened. Plans of resistance would be concerted. But what degree of madness would ever drive the Federal Government to such an extremity?" *Id.* at 298.

Madness it may not be, but unconstitutional it is for the Congress to insist that upon the mere recital of an alleged, "magic" impact on commerce, it can than perforce regulate the terms and working conditions of virtually all Government employees. To suggest that the legislation is in derogation of constitutional Federalism is to be too mild; it does more than derogate, it abrogates the federal division of powers in the Constitution. The "common mass" envisioned by Chief Justice Marshall and the "madness" articulated by Madison are embodied in the 1974 Amendments.

There is no colorable argument that regulation of personnel practices – wages, hours, living, promotion practices – is not the single most vital, *internal* function of States and Cities. If there is individuality; if there is innovativeness; if the Governments closest to the people are to function as the "laboratories" of trial and error in democracy (first coined by Justice Brandeis in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311; then, by definition, there must be control over the people hired to man them.

It is important that State and local Government employees look to their employing Governments rather than to Appellee in Washington to improve their employment terms and conditions.

Appellant National Governors' Conference recently published INNOVATIONS IN STATE GOVERNMENT, which contains descriptions by the Governors of their unique approaches to various problems high on the State's agenda. It is instructive to note that the very first article, by Governor Patrick J. Lucey of Wisconsin concerns "Increasing State Government Productivity." Governor Lucey writes:

> "If he [the Governor] is a good administrator, he may be able to widen that line-by improving the efficiency and productivity of government. In a time of increasing fiscal constraints on state government (and political constraints on raising taxes), achievement of his programmatic goals may depend on just such administrative success."

Governor Lucey then describes how he encouraged his employees to become innovative about ways and means of increasing their productivity:

> "Getting agencies to think about productivity was an essential first step to a state productivity policy. Next, working with the Department of Administration (our budget bureau), we decided upon a target figure for productivity improvement-2½ percent per year-a figure which is less than the average yearly productivity gain in the private sector. A memo was sent to all agencies of state government asking them to outline ways in which they would meet this figure for the first year of the 1973-75 biennial budget, and suggesting avenues of approach which they should explore. By setting a target figure and putting agencies on record as to how they would meet it, we made certain that they would do more than "think" about productivity. By giving them sufficient lead time and an active involvement in the planning

process, we strengthened the possibility that they would become seriously committed to the goal itself."

How can a Governor conceivably initiate innovative progress designed to improve State Government productivity when the power to regulate state personnel practices-wages, hours, working conditions-resides somewhere in the labyrinthine bureaucracy of the Department of Labor? To control personnel is to control program; there can be no meaningful division of powers in the federal system if the National Government controls the terms and working conditions of employment for the "non-supervisory" employees of its supposedly sovereign "partners." The road to this centralization of power in the Federal capital is all too easy to travel; the road back, toward the Federal system envisioned in the Constitution would be difficult, if not impossible, if this Court embraces the Appellee's arguments on behalf of the Amendments of 1974.

g. Congressional regulation under the spending power is an admission that such governmental regulation of Government cannot be accomplished constitutionally under the Commerce Clause.

Federal regulation of States and Cities has been upheld under the spending power, Art. I, Sec. 8, cl. 1 of the Constitution. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295; *Stearns v. Minnesota*, 179 U.S. 223, 232.

So, the objection of this Court in *United States v. Butler*, 297 U.S. 1, 64, and *Carter v. Carter Coal Co.*,

298 U.S. 238, 292, that Federal regulation could not proceed under the guise of the Spending Clause, was avoided by the Congress in using "strings" to force State compliance with the Federal social security and unemployment compensation scheme, a mechanism upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548, 586. There, this Court characterized the Federal mechanism as "inducement", not "weapons of coercion, destroying or impairing the autonomy of the states." In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 526, upholding a State act so "induced", the Court declared the essential feature of Federalism which the Fair Labor Standards Act Amendments at issue here contravene:

> "The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."

This distinction between Federal contravention of State sovereignty under the spending power and Federal contravention of the Tenth Amendment was expressly made in *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143:

> "While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to state[s] [redacted] shall be disbursed.

"The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded *in this case.*" (emphasis added).

2. The 1974 Amendments, In Derogating The Constitution's Federal System Partnership, Must Pass A Higher-Than-Rational-Basis Test.

The effect of the Act is not limited to the fiscal and non-fiscal impact on State and City operations.

This Case involves power under the Constitution of the United States to regulate wages, hours and other personnel practices of more than 11,000,000 State and City employees.[69] From the adoption of the Constitu-

[69]Coverage of State and local employees under the Amendments is intended to be all-inclusive. Section 3 of the Act, 29 U.S.C. § 203, conclusively states that activities of a "public agency" (as defined in § 3(x), 29 U.S.C. § 203(x)) are activities performed for a business purpose, therefore making such activities those of an "enterprise" (as defined in § 3(r)) and that employees of an enterprise which is a public agency shall for purposes of subsection(s) be deemed to be employees of an "enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 203(r)(3). The Act's definition of "employee", 29 U.S.C. § 203(e)(1), excludes by grace from coverage only a narrow enclave of elected officials, immediate staffs and appointees, who to be excluded must also not be subject to State civil service laws. 29 U.S.C. § 203(e)(2)(C).

While the Act provides other exemptions such as those in 29 U.S.C. § 213 exempting professional, executive and administrative employees from the Act's minimum wage and maximum hours requirements (29 U.S.C. § § 206 and 207, but not § 206(d)), such exemptions in no way affect the applicability of other of the Act's requirements (such as recordkeeping) to these employees, and therefore in no way restrict coverage of the Act.

tion until 1974 this power to regulate terms and conditions of employment of their own employees was considered to reside in the States and their political subdivisions except, from 1966, for those hospital and school employees competing with similar "enterprises" as to be covered by the Act as upheld in *Maryland v. Wirtz*. As already stated, *supra*, States and Cities treat their employees fairly and reasonably as to terms and conditions of employment. William F. Danielson, Director of Personnel for Sacramento, California, has stated that the average salary of all firefighters is over $11,000 per year.[70] Studies by the Labor Department found that States and Cities pay higher salaries than the wages mandated by the Act. There is therefore no compelling governmental interest or reason for applying the Act to State and City employee terms and conditions of employment.

To follow *Wirtz* in this case would be to ignore the principle—which this Court in *Wirtz* did not consider, likely because of its finding, at 392 U.S. 193, of no Federal interference with the Governments of States, that a rational basis for Federal legislation is more reluctantly found where to do so would force the States and Cities to reduce or eliminate provision of essential Government service.

[70]Letter of William F. Danielson, December 24, 1974, citing to a survey conducted by the Equal Employment Opportunity Commission in October, 1973. (App. 625-38).

a. Not the rational basis test, but a higher test, must be applied where Federal legislation contravenes a fundamentally protected constitutional right.

State legislation is more carefully scrutinized[71] under the Fourteenth Amendment when it interferes with an expressly stated constitutional right such as freedom of speech. So also must Federal legislation be more carefully scrutinized under the Fifth Amendment standard of rationality when it interferes with rights and powers expressly stated for States and the People to preserve their parts in Federalism under the Tenth Amendment. As to application of the Fifth Amendment to the Commerce Clause of the Constitution, see

[71] This higher-than-rational basis test has been phrased as "carefully and meticulously scrutinized", *Reynolds v. Sims*, 377 U.S. 533, 562; "that States may not casually deprive", *Carrington v. Rash*, 380 U.S. 89, 96; "the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms . . . ", *Thomas v. Collins*, 323 U.S. 516, 530; "strict scrutiny", *Skinner v. Oklahoma*, 316 U.S. 535, 541; "compelling governmental interest", *Dunn v. Blumstein*, 405 U.S. 330, 342. See also, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670; *Thornhill v. Alabama*, 310 U.S. 88, 95-96, 104; *Meyer v. Nebraska*, 262 U.S. 390, 399-400; *Schneider v. Irvington*, 308 U.S. 147, 161; *Bates v. Little Rock*, 361 U.S. 516, 524; *Gibson v. Florida Investigation Committee*, 372 U.S. 539, 546; *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627; *NAACP v. Alabama*, 357 U.S. 449, 463; *NAACP v. Button*, 371 U.S. 415, 438-439; *Roe v. Wade*, 410 U.S. 113, 155; *Shapiro v. Thompson*, 394 U.S. 618, 641; *Sherbert v. Verner*, 374 U.S. 398, 406; *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (Frankfurter, J., concurring); *Williams v. Rhodes*, 393 U.S. 23, 31.

McCray v. United States, 195 U.S. 27; *Scranton v. Wheeler*, 179 U.S. 141.

A test higher than the general rule of review by this Court of Federal legislation, the rule of seeking a "rational basis" for Federal regulation of private industry,[72] must be applied in this case. This exception requires that Federal legislation contravening fundamentally protected rights[73] be supported by more than a rational basis as was adumbrated in *United States v. Carolene Products Co.*, 304 U.S. 144:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." 304 U.S. at 152 n. 4.

This Court has recommended that "Congress is free to apply the same principle in the exercise of its powers." *Katzenbach v. Morgan*, 384 U.S. 641, 654 n.15. See also, *State Board of Education v. Barnette*, 319 U.S. 624, 638-639:

[72] " . . . regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152.

[73] Neither the concepts of strict scrutiny nor of fundamental rights under the Equal Protection clause are foreign to judicial review of Federal legislation. *Dennis v. United States*, 341 U.S. 494, 508-509; *Bolling v. Sharpe*, 347 U.S. 497, 499; *Shapiro v. Thompson*, 394 U.S. 618, 641.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. ***The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds*. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." 319 U.S. at 638-639. (emphasis added)

b. The governmental powers of the States are a fundamentally protected constitutional right embodied in the Tenth Amendment.

Mr. Justice Jackson has been quoted as saying of the Tenth Amendment:

"I know that it is now regarded as more or less provincial and reactionary to cite the Tenth Amendment, . . . That Amendment is rarely mentioned in judicial opinions, rarely cited in argument. But our forefathers made it a part of

the Bill of Rights in order to retain in the localities certain powers and not to allow them to drift into centralized hands. Perhaps the Tenth Amendment is drifting into oblivion . . . ".[74]

But the Tenth Amendment is not to be shorn of its meaning by narrow and technical construction. It must not be consigned by this Court to oblivion. It must be considered fairly and liberally so as to give effect to its scope and meaning. And a major reason is that the guarantees embodied in the Tenth Amendment are a fundamentally protected constitutional right.[75] When the issue is a conflict between State and Federal regulation of a given economic enterprise, and Congress has either explicitly or by construction dealt with the area, such regulation pre-empts that of an individual State. However, when the subject regulated is no longer an economic enterprise but the State Government itself, there exists no precedent for Federal regulation and "the implications of our dual system of Government" cannot thereby be destroyed.

To use whatever impact States may have upon commerce as an excuse for the total restructuring of State budgetary activities and priorities by Federal regulation has been rejected even by the majority in *Wirtz*. This violation of our constitutional Federalism

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[74]Smith, *What Has Happened To The Tenth Amendment*, 10 La. Bar J. 21 (1962).

[75]Constitutional expression of a fundamental right will require the higher than rational basis test, whereas other interests not expressly or impliedly protected in the Constitution itself may be contravened upon a showing of a rational basis. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 30, 35 (education).

has no precedent in the history of the Constitution and has no rational basis today.

In *Polish Nat'l Alliance v. Labor Board*, 322 U.S. 643, 650, the Court said by way of dictum:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make in-roads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." 322 U.S, at 650.

In *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 594, the Court held that a State Governor's suspension of a railroad commissioner would not be inquired into by Federal Courts except on deprivation of "one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen. . . ."

The same policy of noninterference with State Government administration must be applied against the Congress as against the Courts.

And in *Kotch v. River Port Pilot Comm'rs*, 330 U.S. 552, 557 the Court upheld against challenge on equal protection grounds a State law requiring that maritime pilots be qualified State officers. The Court said:

> "[A]n important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. [citing cases]."

The Court stated in *Taylor v. Beckham*, 178 U.S. 548, 570-571, the principle that:

> "It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualification of their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."

This principle is equally applicable to the right and power of States and their political subdivisions to regulate the employment of all employees of State and local Governments, who are the agents and servants of State and local officers.[76]

On the specific point of this Case, the Court in *Newton v. Comm'rs*, 100 U.S. 548, 559, said:

> "The legislative power of a State, except so far as restrained by its own Constitution, is at all

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[76]The independence of States and the State and local officers, which is provided in our constitutional Federalism, can only be preserved by preserving from Federal incursion State judgments about the use of servants and agents in providing essential Government services.

In *Gravel v. United States*, 408 U.S. 606, 616-617, a case determining, *inter alia*, the extent to which a servant and agent of a United States Senator takes the legislative privilege of the Senator, the Court said:

> "that it is literally impossible, in view of the complexities of the modern legislative process . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they *must be treated as the latter's alter ego.*" 408 U.S. at 616-17. (emphasis added).

times absolute with respect to all offices within its reach. It may at pleasure create or abolish them or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. Butler v. Pennsylvania, 10 How., 402.

"The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character." 100 U.S. at 559.

The interest of municipalities in efficiently safeguarding "the health and safety of entire urban populations" was weighed in *Camara v. Municipal Court*, 387 U.S. 523, 533, under this test:

"[I]n applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration."

As a fundamentally protected constitutional right, the Tenth Amendment stands with other fundamentally protected constitutional rights for the preservation of which this Court has demanded that Federal legislation pass a test higher than that of having a rational basis. See, *American Communication Assn v. Douds*, 339 U.S. 382, 400; *Dennis v. United States*, 341 U.S. 494, 508-509, 526-527; *United States v. C.I.O.*, 335 U.S. 106, 140 (Rutledge, J., concurring); *United States v. O'Brien*, 391 U.S. 367, 376-377; *Marchetti v. United States*, 390 U.S. 39, 44, 58.

Similarly, a higher protection is given to State and City Government operation in analyzing where congressional silence in an area of regulation nonetheless

can be said to have preempted[77] the field from State regulation under the Supremacy Clause, Art. VI, cl. 2 of the Constitution.

"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 351.

This test takes into account "the peculiarities and special features of the Federal regulatory scheme in question." *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638. See also, *United Automobile, A. & A.I.W. v. Wisconsin Employment Relations Board*, 351 U.S. 266,

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[77]See e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67; *Pennsylvania v. Nelson*, 350 U.S. 497, 500; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229. *Pennsylvania v. Nelson*, 350 U.S. at 497, 501-505, declared several tests for finding Federal supercession. Second of these tests, *Id.* at 504, was whether "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' [citing *Hines v. Davidowitz*, 312 U.S. 52]." Appellants urge that the obverse of this test must find the State and City interest so dominant in preserving the Federal system as to preclude the possibility of Federal interference by the 1974 Amendments being sustained. This Court reasoned similarly concerning congressional silence in § 16 of the Fair Labor Standards Act in *Employees v. Missouri Public Health Dept*, 411 U.S. 279, 285. That Congress has acted in the 1974 Amendments to make explicit the interference with States and Cities (here in violation specifically of the Eleventh Amendment; see *infra* section 5) which this Court would not infer in *Employees* merely makes this congressional action unconstitutional.

275 ("We would not interpret an act of Congress to leave [States] powerless to avert [violence] without compelling directions to that effect.")

In this case, there is no possibility of an "unexpressed purpose" to nullify State and City control over Government operations. Congress clearly has spoken in § 6 of the Act, Pub. L. No. 93-259, 88 Stat. 55 amending 29 U.S.C. § 203. But Congress has failed to give compelling directions and reasons supporting its interference with State and City Government. This Court should apply the same protection of State and City Government integrity here where Congress has clearly spoken in opposition to our system of constitutional Federalism, as where Congress' intention is construed to avoid interference with States and Cities. Only the result is different here: the 1974 Amendments cannot be saved by construction; they are unconstitutional and must so be declared.

The States not having surrendered such unique and unusual powers to regulate their own employees as to terms and conditions of employment, the Federal government has no such constitutional power. The States surrendered only a part of their power to the Federal government.

Although he made a much quoted statement about the Tenth Amendment in *United States v. Darby*, 312 U.S. 100, 124 that:

> "The amendment states but a truism and all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitu-

> tion before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . ."

Mr. Justice Jackson also said there:

> ". . . all is retained that has not been surrendered."

Chief Justice Marshall wrote:

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*, 4 Wheat. 316, 410.

No constitutional power is given or implied to burden the instrumentalities by which States and their political subdivisions exercise their governmental functions. The National War Labor Board rendered a landmark war-time decision written by Wayne Morse, but concurred in by all members, holding that the Federal Government did not have constitutional power to fix wages and salaries of state and local government officers and employees – even in war time. In so deciding the Board said:

> "It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing service for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its

power and jurisdiction. The employes involved in the instant cases are performing services for political subdivisions of state governments. *Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employes would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government.*

In the Matter of Municipal Government, City of Newark, et al., Nationai War Labor Board, Nos. 47 and 726 (1942), reprinted in full in Rhyne, LABOR UNIONS AND MUNICIPAL LAW, at 228-240 (1946) (emphasis added).

Interestingly enough, a concurring opinion states at 241:

"It is unreasonable to believe that a Federal agency or Board can deal with better judgment or with greater justice in these cases than the regularly elected and constituted officers of these municipalities.

If the public authority were to be centralized in the hands of Federal officials, it would be inevitable that the American system of government would be destroyed.

It is clear that the National War Labor Board has no jurisdiction in these cases through any of the provisions of the Constitution of the United States, or through any Federal or State law." (emphasis added).

In our Federal scheme of government, the entire nation is composed of a Union of separate and equal state governments, and the concept of Federalism[78]

[78]"Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or 'States', for common purposes;

rests on the belief that the national Government will fare best if the states and their local governments are left free to perform their governmental function in their separate ways as best adapted to local needs and views.

Such a system embodies a concept in which the national government, in protecting federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states. Mr. Justice Stone, in *Educational Films Corp. v. Ward*, 282 U.S. 379 noted that:

"The necessity of marking those boundaries [which define the limits of the powers and immunities of state and national governments] grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without

(2) the division of legislative powers between a 'National Government', on the one hand, and constituent 'States', on the other, which division is governed by the rule that the former is 'a government of enumerated powers' while the latter are governments of 'residual powers'; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the 'National Government' within its assigned sphere over any conflicting assertion of 'State' power; (6) dual citizenship." CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 92-82, 92d Cong., 2d Sess. XVIII (1972).

undue interference from the other." 282 U.S. at 391-392.

On this concept of the relationship between the Federal government and the States, Mr. Justice Black in *Younger v. Harris*, 401 U.S. 37, said for the Court:

> "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism,' The concept does not mean blind deference to 'States Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of the Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S. at 44-45.

And this Court has said in a case in which it found a provision of an Act of Congress (The Federal Home Owners' Loan Act of 1933) to be an unconstitutional encroachment upon the reserved powers of the States under the Tenth Amendment:

> "[T]he Tenth Amendment preserves a field of autonomy against federal encroachment." *Hopkins Federal Savings Ass'n v. Cleary*, 296 U.S. 315, 337 (1935).

3. The Federal Government Cannot Justify, Under Any Test, Usurpation Of State And City Government Functions Under An Act Designed To Regulate Private Industry.

The 1974 Amendments included within the coverage of the Act all State and City employees with minor exclusions.[79] The fact that certain of these employees are given exemptions and exceptions later in the Act in no way changes the Federal assertion of power (including the power to exempt) over all State and City

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[79]Section 3(e) of the Act, 29 U.S.C. § 203(e), as amended by Section 6 of Pub. L. No. 93-259 (App. to this Brief, *infra*, 4a), provides in relevant part:

> "(e)(1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means -
>
> * * *
>
> "(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual -
>
> "(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
>
> "ii) who -
>
> "(I) holds a public elective office of that State, political subdivision, or agency,
>
> "(II) is selected by the holder of such an office to be a members of his personal staff,
>
> "(III) is appointed by such an office-holder to serve on a policymaking level, or
>
> "(IV) who is an immediate adviser to such an office-holder with respect to the constitutional or legal powers of his office."

Government employees.[80]

The Court in *Wirtz* recognized the truth of the congressional declaration of full power of usurpation:

> "Nor is it relevant that Congress originally chose to exempt all state enterprises and later partially removed that exemption. Congress was as free to include state activities within the general regulation at a later date as it would have been to omit the exemption in the first place." 392 U.S. at 199 n.28.

In applying the higher-than-rational basis test to the text of the 1974 Amendments and the Act here challenged, and to the facts of this Case, this Court must balance the need of local flexibility against a Federal imposition of rigidity. And in doing so the vast differences between private business for whom the Act is written and the public business for which Governments exist must be kept in mind. This Act was written for private business and the regulations issued under it were written for private business. They do not fit Government or public business. Defendant has so admitted as to 85% of the regulations issued. (Pritchard Deposition at 121-123, App. 167-69). Nowhere is this difference between public business and private business illustrated better than in the variety of tasks Government must perform.

The District Court below found as a fact that "the institutions whose employees are in question here

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[80] C.f., *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 115, and *Choteau v. Burnet*, 283 U.S. 691, 697, construing inclusion of "gross income" within the tax statutes, now 26 U.S.C. § 61 (1970), to include all income, "from whatever source derived" subject to exclusion in other sections of the Internal Revenue Code.

perform governmental functions not seriously in competition with private industry." (App. 650). The functions so found not to be within the "competition" nexus of *Wirtz* are the entirety of State and City functions, (Complaint ¶16, App. 16), each of which involves State and City personnel and personnel costs.

a. The Act violates the principles of local autonomy and of local "ballot box" control over governmental functions.

The system of checks and balances upon which our Nation has thrived includes above all the checks and balances inherent in strong State and local Governments each free to experiment in meeting its responsibilities without centralized Federal control.

Local Government is based on need, thus it is as varied as the need requirements of each community. Climate, topography, rivers, lakes, seas, all play a part.

The variety of our Federal system is strengthened by the wholesomeness of local and regional variations. Disadvantaged particularly by the restrictions of the 1974 Amendments on volunteerism are the rural and sparsely settled parts of our Nation.

In *Sailors v. Board of Education*, 387 U.S. 105, 110-111, a County school board election scheme was upheld, the Court saying:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

See also, *Phoenix v. Kolodziejski*, 399 U.S. 204, 209.

As Justice Brandeis warned in *New State Ice Co. v. Liebmann*:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." 285 U.S. 262, 311 (dissenting opinion).

This Court must consider the Commerce Clause against the needs of the entire constitutional scheme of Federalism,[81] in evaluating whether a claim of Federal power to dictate 85% of City and State budgets, and to eliminate fair and reasonable State and City personnel law, can stand.

Our constitutional scheme of Federalism includes the guarantee of ballot box control by citizens over their governmental units; this is the People's power guaranteed by the Tenth Amendment. In *Hadley v. Junior College District*, 397 U.S. 50, the unifying factor behind this right of local control over governmental functions was recognized:

> "The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions." 397 U.S. 50 at 54.

[81] The Constitution mentions States 114 times.

Included within the constitutionally protected governmental functions under Federalism are the necessary fiscal decisions comprising the budgetary process of each unit of local Government. Thus, the County Commissioner's Court held subject to ballot box control in *Avery v. Midland County*, 390 U.S. 474, was described as "representative of most of the general governing bodies of American cities, counties, towns and villages" in that:

> "It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop – whether industry should be solicited, roads improved, recreation facilities built and land set aside for schools – and immediate choices among competing needs." 390 U.S. at 483.

Here, the 1974 Amendments remove from State and local "ballot box control" decisions on the extent and nature of State and City Government services. No one has elected Appellee; no one has elected his Administrator of Wages and Hours and the hundreds of Federal employees of that Division, who now under the Act will decide important salary questions with salaries constituting 85% of city budgets. (Pritchard Deposition at 125-126, App. 170-171) These Federal officials are not responsible to the needs and wishes of citizens in 18,000 Cities and 50 States. (Pritchard Deposition at 212-13, App. 230-31)

b. The 1974 Amendments irrationally affect, under the commerce power, Governments which are not in commerce.

The Appellee argues that States are within the commerce power grasp of Congress because States import goods from other States and use these goods in providing services entirely intrastate. S. Rept. No. 93-960, 93d Cong., 2d Sess. 24; Appellee's Motion to Affirm 11-12. Under this reasoning, a State or City would be within the Federal commerce power solely because it purchased a fire truck made in Detroit to put out intrastate fires or a trash truck made in Detroit to collect trash. Whether such a situation is within the Fair Labor Standards Act is before this Court on a question of statutory construction. *Iowa v. Brennan*, No. 73-1565, *petition for cert. filed*, 43 U.S.L.W. 3064. In any case, to say that such a nexus to commerce will pass "strict scrutiny"[82] and counterbalance "indispensable democratic freedoms"[83] would shock those who have acted to preserve "Our Federalism"[84] from irrational interference.

The Appellee's Motion to Affirm at page 21 claims that spreading employment to more workers is a goal of the Act. However sensible this reasoning, carried through the Act from its inception[85] to the present[86]

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[82] *Skinner v. Oklahoma*, 316 U.S. 535, 541.

[83] *Thomas v. Collins*, 323 U.S. 516, 530.

[84] *Younger v. Harris*, 401 U.S. 37, 44.

[85] H.R. Rept. No. 1452, 75th Cong., 1st Sess. 7-9 (1937); S. Rept. No. 884, 75th Cong., 1st Sess. 3 (1937).

[86] See, S. Rept. No. 1487, 89th Cong., 2d Sess. 22 (1966); H. Rept. No. 871, 89th Cong., 1st Sess., 30-31 (1966), concerning application of the Act to State-owned schools and hospitals.

may be as applied to private industry, where the cost of training a new employee and the cost of carrying a new pensioner may be passed on to the consumer, it cannot reasonably be applied here, where States and Cities operate under debt and tax limitations.

As to the specific essential Government functions with which the 1974 Amendments interfere, the Federal Courts have recently reaffirmed that the collection of State taxes is primarily of local nature and activities incidental to it do not amount to the production of goods for commerce. In *Hodgson v. Hyatt Realty*, 353 F. Supp. 1363 (M.D.N.C. 1973), *aff'd sub nom. Brennan v. Hyatt Realty*, No. 73-1869 (4th Cir., filed January 10, 1974), the manufacture of state license plates and their sale was held not to come within the Fair Labor Standards Act coverage:

> "The employees in the present case do not produce goods *for commerce*. The various items and information they handle is done pursuant to their duty to collect taxes. *** The scheme set up by the State to collect its taxes has primarily intrastate influence." 353 F. Supp. at 1374 (emphasis in original).

In describing the State function of tax collection, the Court stated:

> "Tax money is not a good under the Act. Using the most general term in the definition of 'goods', tax monies are not 'articles or subjects of commerce' (29 U.S.C. §203(i)). They are a quantity derived from a power unique to the State. As such, they are the product of a very local, intrastate activity." 353 F. Supp. at 1372.

c. Appellee's regulations under the Act violate the Fifth Amendment's Due Process requirements.

The Appellee and his Wage and Hour Administrator have not promulgated new regulations, suited to the unique nature of Government, for the bulk of State and City employees, except for regulations covering police and fire personnel, 39 Fed. Reg. 44141 (Dec. 20, 1974) which were published 6 working days before their effective date.[87]

1) The regulations in effect as of December 31, 1974 do not take into account the peculiar nature of Government, in violation of Due Process.

Especially where criminal penalties are imposed, the failure of a statute[88] or regulation[89] to inform "what the [Government] commands or forbids" has been held to violate Due Process. "No one may be required at peril of life, liberty or property to speculate as to the

[87]These regulations, and enforcement of the Act against States and Cities and the effective date of certain parts of the 1974 Amendments, have been stayed by this Court until further order of Court. Nos. A-553 and A-556, Stay Order issued Dec. 31, 1974, and extended by the Court, Jan. 13, 1975.

[88]See *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Winters v. New York*, 333 U.S. 507, 515; *United States v. Harriss*, 347 U.S. 612, 617; *Lambert v. California*, 355 U.S. 225, 227-230.

[89]See *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674.

meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453.

The 1974 Amendments and the Regulations thereunder promulgated by the Secretary violate the Fifth Amendment requirement of Due Process. The Fair Labor Standards Act, which is in its entirety applied to States and Cities by the 1974 Amendments, contains both civil penalty provisions[90] and criminal penalties.[91]

The Act is necessarily broad and general in its language. To "provide a practical guide to employers and employees as to how the office [the Secretary's Administrator of the Wage and Hour Division] representing the public interest[92] in its enforcement will seek to apply it." *Skidmore v. Swift & Co.*, 323 U.S. 134, 138, Regulations have been promulgated. These regulations now comprise one 691-page volume of the Code of Federal Regulations. These regulations are 85%

[90]"Liquidated damages" are provided by Section 16(b), 29 U.S.C. § 216(b) in an amount equal to back wages, for violation of the minimum wage or overtime provisions of the Act.

[91]Sec. 16(a), 29 U.S.C. § 216(a) provides criminal penalties for willful violations of the minimum wage or overtime provisions of the Act.

[92]The very language of *Skidmore* shows the irrationality and unconstitutionality of applying the Act to State and local Government: the Administrator of Wages and Hours, in enforcing the 1974 Amendments, must purport to represent the "public interest" while interpreting an Act which usurps personnel decision-making from locally elected State and City officials. In the name of the "public interest", a non-elected Federal employee in Washington is empowered by the 1974 Amendments here challenged to impose his views on the citizens of 50 States and 18,000 municipalities in derogation of the decisions of the elected officers of those Governments.

inapplicable to States and Cities. (Pritchard Deposition at 121-123, App. 167-69).

Police and fire personnel are actually disadvantaged by the special regulations covering them. Under 29 C.F.R. §553.15, sleeping and eating time must be included as hours worked where a shift of exactly 24 hours is assigned; for employees other than police and fire personnel, sleeping and eating time is deducted from hours worked where a shift of exactly 24 hours is assigned. 29 C.F.R. §785.21.[93] Since a shift of exactly 24 hours is by far the most common for fire personnel (Pritchard Deposition at 169, 170-71, App. 201-03), the "special treatment" accorded City and State Governments costs State and local taxpayers even more money, without a rational basis.

2) The police and fire personnel regulations, designed for States and Cities, were published 6 business days before their effective date, making compliance impossible in violation of Due Process.

Appellee's regulations covering terms and conditions of employment of State and local police and fire fighters which were printed in the Federal Register of December 20, 1974, allowed such an unreasonably short time as to make compliance by State and local governments impossible. No State or local Government could possibly receive and act upon those regulations in the some six business days allowed over the Christmas holidays. This Court can take judicial notice that few

[93]This section is one of the regulations promulgated with industry in mind, and automatically made applicable to States and Cities by the 1974 Amendments.

State and local Governments could have received these regulations by mail in the time Defendant provided. To give the notices, to hold the hearings, and to take the law and budget actions required by State and local law within the time allowed is clearly impossible. To assess and act upon the shocking reversal by the regulations of customary practices as to sleep and meal time requires State and local Government law and budgetary changes of vast impact.

These regulations have a "ripple" controlling effect beyond police and fire fighters on the whole of local government employee terms and conditions, a matter of difficult and enormous troubles in that 85% of local budgets are made up of employee salaries. (Pritchard Deposition at 125-26, App. 170-71).

In this Case, it cannot be said that the Act does not greatly affect State and City operations. Paragraphs 44-72 of the Complaint, (App. 27-36) show the fiscal impact on States and Cities of the Act, based on 25 of 18,000 Cities and 10 of the 50 States; Deposition Exhibits 1-36, 38-48 (App. 311-565, 568-587), add the fiscal impact on more States. The totals of those expert estimates are: $57,000,000 in first year costs for only the 25 Cities and 10 States, with a $200,000,000 estimate of first year increased costs for all firemen, and an expert informed estimate of over one billion dollars in 1975 in increased costs.

The majority of increased costs resulting from the Amendments do not flow from the Act's basic mandates regarding minimum wages and maximum hours. The greater portion of the budget-breaking fiscal impact projected for this federally dictated policy stems from the generalized regulatory provisions under the

Act and the Act's history of application to private enterprise. When these policies collide with the diversity of State and local Government practices, the result is to force additional costs upon those Governments. This result is illustrated by examples given in the Complaint in the areas of compensatory time off (Complaint ¶¶49, 66; App. 29-30, 35), flexible scheduling practices (Complaint ¶¶49; App. 29-30) employment of student interns (Complaint ¶¶49, 60; App. 29-30, 33-34), police and fire training (Complaint ¶¶56, 69-70; App. 32, 35-36), availability of "reserve" policemen (Complaint ¶57; App. 32-33) and paid volunteers (Complaint ¶28, App. 21) institution of affirmative action programs (Complaint ¶59, App. 33) computation of payrolls (Complaint ¶63, App. 34) membership on volunteer boards and commissions (Complaint ¶65, App. 34-35) and joint employment (Complaint ¶¶29, 46; App. 22, 29)

4. In No Case Other Than *Maryland v. Wirtz* Has Federal Usurpation Of State And City Government Operation Been Upheld In Derogation Of The Fundamental Constitutional Protection Of Constitutional Federalism And That Case Was Wrongly Decided.

Maryland v. Wirtz, 392 U.S. 183, is the only Decision to uphold Federal power to control and regulate State and City Government governmental functions by calling them commerce. For the reasons set forth here and, in greater detail, *supra* at pages 26-29, it is respectfully urged that *Wirtz* was wrongly decided and should be overruled. The majority in *Wirtz* rejected the reasoning of the dissent by Mr. Justice Douglas, concurred in by Mr. Justice Stewart that " . . . Congress could under today's decision declare a whole state an 'enterprise' affecting

commerce and take over its budgeting activities." (392 U.S. at 196 footnote 27). Yet that is precisely what Congress did in the 1974 Amendments here challenged.

The opinion of a divided Court in *Wirtz* did not address itself to the question of this case, whether a Federal act which irreparably harms States and Cities in conflict with valid, fair and reasonable State and City laws and policies for the operation of States and Cities can have a rational basis. The opinion in *Wirtz* is neatly divided into consideration of two principal challenges to the 1966 amendments to the Fair Labor Standards Act. The Court, at 392 U.S. 188-193, considered the rationality of the "enterprise concept" as applied to all employees, including those of the private sector. There is no discussion here of rationality of the "enterprise concept" as applied to the facts of the case, that is, as applied to States. The majority opinion, at 392 U.S. 195-199, then considered whether the Tenth Amendment to the Constitution could stand in the way of "the Federal Government, when acting within a delegated power," 392 U.S. at 195. The missing logical connective, of course, is whether the power is rationally delegated and the Federal Government can rationally act within the delegated commerce power when it takes action usurping State governmental power and dictates to States and Cities the extent of essential Government services. The opinion of the divided Court in *Wirtz* treated this connective, the essence of the instant Case, only cursorily. In doing so, the Court found facts and enunciated law which are not here controlling. The Court found with respect to the challenge there:

> "The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages

are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate." 392 U.S. at 193.

The vast new Federal records, and reports and decisions required by the Act of States and Cities and the restructuring of State and local employment practices from State and City to Federal control, are enormously costly. Governor Askew of Florida estimates an annual $800,000 for new "Federally mandated record keeping costs under the Act" for his State. (Defendant's Ex. 43 to Byrley Deposition and Complaint ¶37; App. 575-576, 25)

Appellee offers no estimate of the total cost which application of the Act and Regulations will impose as to other State and City employees. The Senate Committee Report on the Act estimated a first year cost of $128,000,000 and a second year cost of $162,000,000. (S. Rept. No. 300, 93d Cong., 1st Sess. 26 (1973)). The House Report estimated an absurd first year cost of $250,000 for the Federal Government and an equally absurd $3,000,000 per year as the cost for the next 5 years. (H.R. Rept. No. 913, 93d Cong., 2d Sess. 41 (1974)).

That the dissent was correct and the majority wrong about the danger of the Congress declaring an entire State Government an "enterprise" and thereby assuming power to virtually draw up each State's budget is clear. That is exactly what has happened under the 1974 Amendments. And while the Congress made no credible

study of the cost impact of these Amendments to State and local Government, this Brief demonstrates that the cost impact is enormous. The majority's reliance in *Wirtz* upon a *de minimis* impact from the 1966 amendments was also erroneous when considered against the facts of record herein that salaries are 80 to 85% of City budgets. (Pritchard Deposition at 125-26, App. 170-71).

Under these circumstances *Wirtz* is not controlling and in fact *Wirtz* should be expressly overruled. The Court did not consider the impact of the 1966 amendments on the entire constitutional scheme of Federalism, including the many other recognitions in the Constitution of that system of Government apart from and in addition to the Tenth Amendment.

A close examination of the cases relied upon by the majority opinion in *Wirtz*, 392 U.S. at 193-199, shows that no case cited by the Court involved a challenge to Federal interference with State or City Government operations. Each case cited dealt either with situations where the interest of the Federal Government was held superior to the interest of the States in regulating private industry, or with situations where a State was held to be directly engaged in commercial competition with a particular private industry. Neither situation is present in this Case; without case support applicable to this Case, *Wirtz* stands alone, and cannot govern this Case.[94]

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[94]On a related point, *Wirtz*, 392 U.S. at 195 n.26 cites two cases (one concerning the National Labor Relations Act and one concerning the Fair Labor Standards Act applied to private industry) to support the point that "engagement of an enterprise in interstate commerce may consist of importation [of goods

The principal case support[95] for the rejection in *Wirtz* of the argument for application of the Tenth Amendment was found in *Sanitary District v. United States*, 266 U.S. 405, 426,[96] and *United States v. California*, 297 U.S. 175, 181-183, 183-185.[97]

Sanitary District enjoined the withdrawal by a political subdivision of a State from Lake Michigan of water for sewage carriage in amounts greater than authorized by the Secretary of War. That decision cannot be read without reference to the treaty power and the conduct of foreign relations by the Federal Government.[98] Despite the Court's dictum to the

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from outside the State]." The Fair Labor Standards Act case, *Wirtz v. Hardin & Co.*, 253 F. Supp. 579 (N.D. Ala. 1964) *aff'd*, 359 F.2d 792 (5th Cir. 1966), found insufficient evidence that "some employees regularly receive groceries and produce from points outside the State of Alabama," 253 F. Supp. at 586 and doubted the plaintiff "intended to press [this] allegation of the complaint." 253 F. Supp. at 586.

[95]See Appellee's Motion to Affirm at 18-19.

[96]Treated in *Wirtz*, 392 U.S. at 195-196.

[97]Treated in *Wirtz*, 392 U.S. at 197-199.

[98]So, the war power must be considered an essential factor in the holding of *Case v. Bowles*, 327 U.S. 92, 101, cited in *Wirtz*, 392 U.S. at 195, as rejecting the existence of a "general" doctrine implied in the Federal Constitution that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." The Court in *Case*, 327 U.S. at 102, found essential to the war power, congressional regulation of sales and rents (there, sale of timber from State-owned lands); the intention of the Federal statute was seen to be the coverage of "sales of commodities by states." 327 U.S. at 100.

contrary, 266 U.S. at 426, the decision does not hold the commerce power a sufficient grant of Federal power to interfere with State governmental operations.

More importantly, *Sanitary District* involved the power of the Federal Government to prohibit interference by States with interstate commerce (there, navigable waterways). The rational basis for legislation supporting that goal is much more apparent than the connection in the amendments upheld in *Wirtz* between State Government and commerce. So, here, States do not interfere with commerce or with any interstate activity, as by erecting trade barriers or inhibiting interstate travel; they merely pay some 11,000,000 employees wages to perform Government services intrastate.

United States v. California upheld the requirement of certain safety devices under the Federal Safety Appliance Act to a State-owned railroad serving a wharf. Implicit in that holding, however, is the finding that "the larger part of [the cars transported on the state-owned railroad] has its origin or destination in states other than California." 297 U.S. at 181-182. The Court in *Wirtz* did not find that State-owned schools and hospitals produced either goods or services with destinations in other States; certainly the District Court below in this Case did not find any such activity.

Beyond its lack of consistency with the holding and effect of *Wirtz* (in serving the Congress as an imprimatur for interference with State and City Governement operations)[99] *California* is even less applicable to this case than it was in *Wirtz*. In *Wirtz*,

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[99]See H.R. Rept. No. 913, 93d Cong., 2d Sess. 6-7 (1974).

392 U.S. at 198, the Court cited *California* as "controlling" and proceeded to conclude:

> "[This Court] will not carve up the commerce power to protect enterprises *indistinguishable in their effect on commerce from private businesses*, simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-199 (emphasis added).

In this Case, the District Court has found, under Rule 56, Fed.R.Civ.P.,[100] that States and Cities here are not in serious competition with other States and Cities or with private businesses

It is respectfully submitted that a take-over or swallowing up of control over State and local governmental powers which those Governments have exercised since the founding of our Nation is much more serious than the Court there recognized.

Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, reaffirmed the prevention of labor disputes which burden interstate commerce as a rational basis for Federal labor legislation. The facts of *Santa Cruz* indicate that an actual dispute arose; the Court's recounting of it makes clear its industrial setting, always involving other industries shipping the same goods down the "stream of commerce":

> "The immediacy of the effect of the forbidden discrimination against these warehousemen is strikingly shown by the findings of the Board. When the men found themselves locked out because of their joining the union, they at once formed a picket line and this was maintained with such effectiveness that eventually 'the movement

[100] Opinion of the District Court below, App. 650.

> of trucks from warehouse to wharves ceased entirely.' The teamsters refused to haul, the warehousemen at the dock warehouses declined to handle, and the stevedores between dock and ship refused to load, petitioner's goods. These became, in the parlance of the men, 'hot' cargo. Petitioner says that this was an unlawful conspiracy of those sympathizing with its discharged warehousemen, but it was the discrimination against them which led directly to the interference with the movement from the plant and elicited the support so effectively given.
>
> It would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce." 303 U.S. at 468-469.

See also, *NLRB v. Fainblatt*, 306 U.S. 601, 604; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34; *United States v. Darby*, 312 U.S. 100, 123.

The statement in *Jones & Laughlin*, 301 U.S. at 36, that "burdens and obstructions [are] not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce", and that "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control," 301 U.S. at 37, must be read with the next sentence:

> "*. . .the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects*

upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. at 37. (emphasis added)

The impact of the totality of the Act upon State and local Governments by the Federal Government and the higher purposes of Federalism of the Constitution were not adequately considered or evaluated in *Wirtz*. It is urged that when these impacts are considered and those higher purposes are applied, *Wirtz* will be found to have been wrongly decided. See *supra* pages 26-30.

5. The 1974 Amendments Also Violate the Eleventh Amendment, An Essential Element in the Constitutional Scheme of Federalism.

The origins and evolution of the Eleventh Amendment, well known to this Court, further indicate a conviction on the part of the Founding Fathers, the early Congresses and this Court to recognize the unique status of the States under the Constitution. Thus, as early as the constitutional ratification by the States, Hamilton expressed the concept that sovereign State Governments, no less than the National Government, should remain immune from suit absent their consent:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in

> the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article on taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on this conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?" THE FEDERALIST No. 81.

A judicial attempt to deny this inherent governmental right of the States in *Chisholm v. Georgia*, 2 Dall. 419, was met with the swift, overwhelming adoption of the Eleventh Amendment.[101] Since its enactment, the scope of the Amendment has been broadened by Court interpretation to grant a State immunity from suit brought against it in Federal Courts by its own citizens as well as those of another State. *Hans v. Louisiana*, 134 U.S. 1, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, *Employees v. Missouri Public Health Dept.*, 411 U.S. 279.

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[101] See *New Hampshire v. Louisiana*, 108 U.S. 76,88.

In *Employees*, this Court refused to apply the doctrine of implied consent articulated in *Parden v. Terminal R. Co.*, 377 U.S. 184, to governmental operations. In barring the employee back pay suits sought under the 1966 Fair Labor Standards Act amendments, this Court stated:

> "Thus we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."
>
> * * *
>
> "It is one thing, as in *Parden*, to make a state employee whole; it is quite another to let him recover double against a state. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly." 411 U.S. at 285, 286.

In spite of the above *caveat*, continued congressional indifference to the unique role of State Governments in our Constitutional structure is manifested in the 1974 Amendments to the Act.[102] Congress has now explictly granted a cause of action by any employee against a public agency for back pay and liquidated damages, thus allowing State employees to sue States without their consent. Such retroactive damage suits are

[102]By amending the Portal to Portal Act of 1974, in the 1974 Amendments here challenged, Congress legislatively overruled this Court's decision in *Employees* by a provision which "suspends the statute of limitations to preserve rights of actions of State or local government employees which would otherwise be barred as a result of the Supreme Court's decision." S. Rept. No. 690, 93d Cong. 2d Sess. 27 (1974). See also H.R. Rept. No. 913, 93d Cong. 2d Sess. 45 (1974).

violative of the Eleventh Amendment as construed in *Edelman v. Jordan*, 415 U.S. 651.

The new Amendments also authorize the Secretary of Labor, without restrictions, to bring suits on behalf of employees for back pay and liquidated damages. This legerdemain allows use of the Secretary's position as an official of the Federal Government to funnel employee damage suits around the Eleventh Amendment's assurance of sovereign immunity. This is similar to calling government commerce! It is clear that such a tactic cannot be upheld when, under the Eleventh Amendment, preservation of a State's sovereign immunity "is to be determined not by the mere titular parties but by the [illegible]ial nature and effect of the proceeding as it appears from the entire record". *Ex Parte New York*, 256 U.S. 490, 500.

Cases upholding the Federal Government's power to bring suit against a State have done so only where States had violated the constitutional rights of their citizens and Congress had the power to authorize judicial actions to end such violations. *United States v. Mississippi*, 380 U.S. 128; *Louisiana v. United States*, 380 U.S. 145. In distinction, the States here are depriving no one of constitutional rights. On the contrary, the States are carrying out the efficient performance of their constitutionally mandated governmental powers by providing fair and reasonable terms and conditions of employee employment.

CONCLUSION

Because the 1974 Amendments to the Fair Labor Standards Act, Pub. L. No. 93-259, cannot under the Commerce Clause abrogate the system of Federalism provided in the entirety of the Constitution, this Act and these Amendments cannot constitutionally be applied to States, political subdivisions of States and Cities. These 1974 Amendments violate the principle of Federalism embodied throughout the Constitution, and violate the Fifth, Tenth and Eleventh Amendments. The Appellee's regulations, under the Act and under the 1974 Amendments' changes to the Act, violate the Fifth Amendment. The Order of the District Court below must be reversed with directions to grant the declaratory and permanent injunctive relief prayed for in the Complaint.

Respectfully submitted,

CHARLES S. RHYNE
WILLIAM S. RHYNE
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorneys for Appellants

Of Counsel:

J. KEITH DYSART
General Counsel, Council of
State Governments
1150 Seventeenth Street, N.W., Suite 602
Washington, D.C. 20036

APPENDIX

1974 AMENDMENTS TO FAIR LABOR STANDARDS ACT, PORTAL TO PORTAL ACT OF 1947, AND AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Public Law 93-259
93rd Congress, S. 2747
April 8, 1974

An Act

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fair Labor Standards Amendments of 1974.

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974". 29 USC 203 note.

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201-219). 52 Stat. 1060.

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6(a)(1) is amended to read as follows: 80 Stat. 838. 29 USC 206.

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;".

INCREASE IN MINIMUM WAGE RATE FOR NONAGRICULTURAL EMPLOYEES COVERED IN 1966 AND 1974

SEC. 3. Section 6(b) is amended (1) by inserting ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974" after "1966", and (2) by striking out paragraphs (1) through (5) and inserting in lieu thereof the following: 86 Stat. 373. 20 USC 1681.

"(1) not less than $1.90 an hour during the period ending December 31, 1974,

"(2) not less than $2 an hour during the year beginning January 1, 1975,

"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

"(4) not less than $2.30 an hour after December 31, 1976."

88 STAT. 55

INCREASE IN MINIMUM WAGE RATE FOR AGRICULTURAL EMPLOYEES 88 STAT. 56

SEC. 4. Section 6(a)(5) is amended to read as follows:

"(5) if such employee is employed in agriculture, not less than—

"(A) $1.60 an hour during the period ending December 31, 1974,

"(B) $1.80 an hour during the year beginning January 1, 1975,

"(C) $2 an hour during the year beginning January 1, 1976,

"(D) $2.20 an hour during the year beginning January 1, 1977, and

"(E) $2.30 an hour after December 31, 1977."

INCREASE IN MINIMUM WAGE RATES FOR EMPLOYEES IN PUERTO RICO AND THE VIRGIN ISLANDS

SEC. 5. (a) Section 5 is amended by adding at the end thereof the following new subsection: 63 Stat. 911. 29 USC 205.

"(e) The provisions of this section, section 6(c), and section 8 shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this Act in the same manner as the minimum wage rate for employees employed in a State of the United States is determined under this Act. As used in the preceding sentence, the term 'State' does not include a territory or possession of the United States.".

(b) Effective on the date of the enactment of the Fair Labor Standards Amendments of 1974, subsection (c) of section 6 is amended by striking out paragraphs (2), (3), and (4) and inserting in lieu thereof the following:

"(2) Except as provided in paragraphs (4) and (5), in the case of any employee who is covered by such a wage order on the date of enactment of the Fair Labor Standards Amendments of 1974 and to whom the rate or rates prescribed by subsection (a) or (b) would otherwise apply, the wage rate applicable to such employee shall be increased as follows:

"(A) Effective on the effective date of the Fair Labor Standards Amendments of 1974, the wage order rate applicable to such employee on the day before such date shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

"(B) Effective on the first day of the second and each subsequent year after such date, the highest wage order rate applicable to such employees on the date before such first day shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

In the case of any employee employed in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the increases prescribed by this paragraph shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage rate is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

"(3) In the case of any employee employed in Puerto Rico or the Virgin Islands to whom this section is made applicable by the amendments made to this Act by the Fair Labor Standards Amendments of 1974, the Secretary shall, as soon as practicable after the date of enactment of the Fair Labor Standards Amendments of 1974, appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates, which shall be not less than 60 per centum of the otherwise applicable minimum wage rate in effect

Infra.
63 Stat. 915;
75 Stat. 70.
29 USC 208.

80 Stat. 839.
29 USC 206.

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Ante, p. 56

under subsection (b) or $1.00 an hour, whichever is greater, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate recommended by the special industry committee shall (A) be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation, but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1974, and (B) except in the case of employees of the government of Puerto Rico or any political subdivision thereof, be increased in accordance with paragraph (2)(B).

"(4)(A) Notwithstanding paragraph (2)(A) or (3), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(A) or (3) of this subsection, shall, on the effective date of the wage increase under paragraph (2)(A) or of the wage rate recommended under paragraph (3), as the case may be, be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

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88 STAT. 58

"(5) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a) or (b) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under such subsection shall apply to such employee.

"(6) Each minimum wage rate prescribed by or under paragraph (2) or (3) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate."

Infra.
63 Stat. 915;
69 Stat. 711.
29 USC 208.

(c)(1) The last sentence of section 8(b) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the following: "except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage."

Ante, p. 55.
Ante, p. 56.

(2) The third sentence of section 10(a) is amended by inserting after "modify" the following: "(including provision for the payment of an appropriate minimum wage rate)".

69 Stat. 712;
72 Stat. 948.
29 USC 210.

(d) Section 8 is amended (1) by striking out "the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry" in the first sentence of subsection (a) and inserting in lieu thereof "the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)", (2) by striking out "the minimum wage rate prescribed in paragraph (1) of section 6(a)" in the last sentence of subsection (a) and inserting in lieu thereof "the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)", and (3) by striking out "prescribed in paragraph (1) of section 6(a)" in subsection (c) and inserting in lieu thereof "in effect under paragraph (1) or (5) of section 6(a) (as the case may be)".

75 Stat. 70.

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FEDERAL AND STATE EMPLOYEES

"Employer."
52 Stat. 1060;
80 Stat. 830.
29 USC 203.

SEC. 6. (a) (1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

"Employee."
80 Stat. 832.

(2) Section 3(e) is amended to read as follows:

"(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

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88 STAT. 59

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

80 Stat. 378.

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

"Industry."
52 Stat. 1060.

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

75 Stat. 65;
86 Stat. 375.

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

80 Stat. 831;
86 Stat. 375.

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

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80 Stat. 831.
29 USC 203.

(B) by striking out "or" at the end of paragraph (3),

(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or",

(D) by adding after paragraph (4) the following new paragraph:

"(5) is an activity of a public agency.", and

(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

"Public agency."
52 Stat. 1060;
80 Stat. 832.

(6) Section 3 is amended by adding after subsection (w) the following:

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.".

75 Stat. 66.
29 USC 204.

(b) Section 4 is amended by adding at the end thereof the following new subsection:

"(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.".

29 USC 216.
52 Stat. 1063;
80 Stat. 842.
29 USC 207.

(c) (1) (A) Effective January 1, 1975, section 7 is amended by adding at the end thereof the following new subsection:

"(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

Effective date.
Supra.

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".

Effective date.

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".

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88 STAT. 61

Effective date. Ante, p. 60.

(D) Effective January 1, 1978, such section is amended—

(i) by striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) by striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days".

75 Stat. 71; 80 Stat. 837. 29 USC 213.

(2)(A) Section 13(b) is amended by striking out the period at the end of paragraph (19) and inserting in lieu thereof "; or" and by adding after that paragraph the following new paragraph:

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);".

Effective date. Supra.

(B) Effective January 1, 1975, section 13(b)(20) is amended to read as follows:

"(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or".

Studies. 29 USC 213 note.

(3) The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.

Supra.

Publication in Federal Register. 52 Stat. 1069; 75 Stat. 74. 29 USC 216.

(d)(1) The second sentence of section 16(b) is amended to read as follows: "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.".

Statute of limitation, suspension. 61 Stat. 87. 29 USC 255.

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

88 STAT. 62

61 Stat. 89. 29 USC 260.

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16".

DOMESTIC SERVICE WORKERS

52 Stat. 1060; 63 Stat. 910. 29 USC 202.

SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce."

80 Stat. 841. 29 USC 206.

(b)(1) Section 6 is amended by adding after subsection (e) the following new subsection:

"(f) Any employee—

"(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or

64 Stat. 492; 68 Stat. 1078. 42 USC 409.

"(2) who in any workweek—

"(A) is employed in domestic service in one or more households, and

"(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b)."

Ante, p. 59. Ante, p. 60.

(2) Section 7 is amended by adding after the subsection added by section 6(c) of this Act the following new subsection:

"(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a)."

75 Stat. 71; 80 Stat. 834. 29 USC 213.

(3) Section 13(a) is amended by adding at the end the following new paragraph:

"(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

Ante, p. 61.

(4) Section 13(b) is amended by adding after the paragraph added by section 6(c) the following new paragraph:

"(21) any employee who is employed in domestic service in a household and who resides in such household; or".

RETAIL AND SERVICE ESTABLISHMENTS

Effective date. 80 Stat. 837.

SEC. 8. (a) Effective January 1, 1975, section 13(a)(2) (relating to employees of retail and service establishments) is amended by striking out "$250,000" and inserting in lieu thereof "$225,000".

Effective date.

(b) Effective January 1, 1976, such section is amended by striking out "$225,000" and inserting in lieu thereof "$200,000".

Effective date.

(c) Effective January 1, 1977, such section is amended by striking out "or such establishment has an annual dollar volume of sales which is less than $200,000 (exclusive of excise taxes at the retail level which are separately stated)".

TOBACCO EMPLOYEES

Supra.

SEC. 9. (a) Section 7 is amended by adding after the subsection added by section 7(b)(2) of this Act the following:

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"(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

"(1) is employed by such employer—

"(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

"(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

"(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.".

Repeal. 75 Stat. 71; 80 Stat. 838. 29 USC 213. Ante, p. 62.

(b)(1) Section 13(a)(14) is repealed.

(2) Section 13(b) is amended by adding after the paragraph added by section 7(b)(4) of this Act the following new paragraph:

"(22) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco; or".

TELEGRAPH AGENCY EMPLOYEES

Repeal.

SEC. 10. (a) Section 13(a)(11) (relating to telegraph agency employees) is repealed.

Supra.

(b)(1) Section 13(b) is amended by adding after the paragraph added by section 9(b)(2) of this Act the following new paragraph:

"(23) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under paragraph (2) of subsection (a) with respect to whom the provisions of sections 6 and 7 would not otherwise apply, who is engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month, and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Ante, pp. 55, 60.

Effective date.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(23) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

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Repeal; effective date. Ante, p. 63.

(3) Effective two years after such date, section 13(b)(23) is repealed.

SEAFOOD CANNING AND PROCESSING EMPLOYEES

75 Stat. 71. 29 USC 213.

SEC. 11. (a) Section 13(b)(4) (relating to fish and seafood processing employees) is amended by inserting "who is" after "employee", and by inserting before the semicolon the following: ", and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(4) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, section 13(b)(4) is repealed.

NURSING HOME EMPLOYEES

80 Stat. 833.

SEC. 12. (a) Section 13(b)(8) (insofar as it relates to nursing home employees) is amended by striking out "any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" and the remainder of that paragraph.

80 Stat. 842. 29 USC 207.

(b) Section 7(j) is amended by inserting after "a hospital" the following: "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises".

HOTEL, MOTEL, AND RESTAURANT EMPLOYEES AND TIPPED EMPLOYEES

Supra.

SEC. 13. (a) Section 13(b)(8) (insofar as it relates to hotel, motel, and restaurant employees) (as amended by section 12) is amended (1) by striking out "any employee" and inserting in lieu thereof "(A) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is", (2) by inserting before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed", and (3) by adding after such section the following:

"(B) any employee of a hotel or motel who performs maid or custodial services and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, subparagraphs (A) and (B) of section 13(b)(8) are each amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-six hours".

Effective date.

(c) Effective two years after such date, subparagraph (B) of section 13(b)(8) is amended by striking out "forty-six hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(d) Effective three years after such date, subparagraph (B) of section 13(b)(8) is repealed and such section is amended by striking out "(A)".

80 Stat. 830. 29 USC 203.

(e) The last sentence of section 3(m) is amended to read as follows: "In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an

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amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.".

SALESMEN, PARTSMEN, AND MECHANICS

80 Stat. 836. 29 USC 213.

SEC. 14. Section 13(b)(10) (relating to salesmen, partsmen, and mechanics) is amended to read as follows:

"(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

"(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or".

FOOD SERVICE ESTABLISHMENT EMPLOYEES

SEC. 15. (a) Section 13(b)(18) (relating to food service and catering employees) is amended by inserting immediately before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, such section is repealed.

BOWLING EMPLOYEES

Effective date.

SEC. 16. (a) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(19) (relating to employees of bowling establishments) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(b) Effective two years after such date, such section is repealed.

SUBSTITUTE PARENTS FOR INSTITUTIONALIZED CHILDREN

Ante, p. 61.

SEC. 17. Section 13(b) is amended by inserting after the paragraph added by section 10(b)(1) of this Act the following new paragraph:

"(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

"(A) who are orphans or one of whose natural parents is deceased, or

"(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or".

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EMPLOYEES OF CONGLOMERATES

52 Stat. 1067; 71 Stat. 514. 29 USC 213. Ante, p. 55.

SEC. 18. Section 13 is amended by adding at the end thereof the following:

"(g) The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).".

Ante, p. 59.

SEASONAL INDUSTRY EMPLOYEES

80 Stat. 835. 29 USC 207.

SEC. 19. (a) Section 7(c) and 7(d) are each amended—

(1) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks", and

(2) by striking out "fourteen workweeks" and inserting in lieu thereof "ten workweeks".

(b) Section 7(c) is amended by striking out "fifty hours" and inserting in lieu thereof "forty-eight hours".

Effective date.

(c) Effective January 1, 1975, sections 7(c) and 7(d) are each amended—

(1) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks", and

(2) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks".

Effective date.

(d) Effective January 1, 1976, sections 7(c) and 7(d) are each amended—

(1) by striking out "five workweeks" and inserting in lieu thereof "three workweeks", and

(2) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks".

Repeal; effective date.

(e) Effective December 31, 1976, sections 7(c) and 7(d) are repealed.

COTTON GINNING AND SUGAR PROCESSING EMPLOYEES

80 Stat. 836.

SEC. 20. (a) Section 13(b)(15) is amended to read as follows:

"(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or".

Ante, p. 65.

(b)(1) Section 13(b) is amended by adding after paragraph (24) the following new paragraph:

"(25) any employee who is engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(25) is amended—

Ante, p. 66. (A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

Effective date. (3) Effective January 1, 1976, section 13(b)(25) is amended—

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

Ante, p. 66. (c)(1) Section 13(b) is amended by adding after paragraph (25) the following new paragraph:

"(26) any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(26) is amended—

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

Effective date. Ante, p. 67. (3) Effective January 1, 1976, section 13(b)(26) is amended—

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

LOCAL TRANSIT EMPLOYEES

SEC. 21. (a) Section 7 is amended by adding after the subsection added by section 9(a) of this Act the following new subsection: Ante, p. 62.

"(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

(b)(1) Section 13(b)(7) (relating to employees of street, suburban or interurban electric railways, or local trolley or motorbus carriers) is amended by striking out ", if the rates and services of such railway or carrier are subject to regulation by a State or local agency" and inserting in lieu thereof the following: "(regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 90 Stat. 836. 29 USC 213.

Effective date. (2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date. (3) Effective two years after such date, such section is repealed.

COTTON AND SUGAR SERVICES EMPLOYEES

SEC. 22. Section 13 is amended by adding after the subsection added by section 18 the following: Ante, p. 66.

"(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who— Supra.

"(1) is employed by such employer—

"(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

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"(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

"(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

"(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.".

Ante, p. 68.

OTHER EXEMPTIONS

Repeal. 80 Stat. 836. 29 USC 213.

SEC. 23. (a)(1) Section 13(a)(9) (relating to motion picture theater employees) is repealed.

(2) Section 13(b) is amended by adding after paragraph (26) the following new paragraph:

Ante, p. 67.

"(27) any employee employed by an establishment which is a motion picture theater; or".

Repeal. 75 Stat. 71; 80 Stat. 838.

(b)(1) Section 13(a)(13) (relating to small logging crews) is repealed.

(2) Section 13(b) is amended by adding after paragraph (27) the following new paragraph:

"(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.".

(c) Section 13(b)(2) (insofar as it relates to pipeline employees) is amended by inserting after "employer" the following: "engaged in the operation of a common carrier by rail and".

EMPLOYMENT OF STUDENTS

80 Stat. 842. 29 USC 214.

SEC. 24. (a) Section 14 is amended by striking out subsections (a), (b), and (c) and inserting in lieu thereof the following:

"SEC. 14. (a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable

Ante, p. 55.

under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

"(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special

certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

Ante, p. 56. 80 Stat. 839. 29 USC 206.

"(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

"(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

"(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

"(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

"(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

"(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establish-

ment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

"Student hours of employment." For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term 'student hours of employment' means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

"(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

Ante, p. 56.

80 Stat. 839. 29 USC 206.

"(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

Regulations.

"(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

"(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed four, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed four—

"(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

"(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

"(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate."

(b) Section 14 is further amended by redesignating subsection (d) as subsection (c) and by adding at the end the following new subsection:

Ante, p. 69.

"(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws."

Ante, pp. 60, 68.

(c) Section 4(d) is amended by adding at the end thereof the following new sentence: "Such report shall also include a summary of the special certificates issued under section 14(b)."

52 Stat. 1062; 69 Stat. 711. 29 USC 204.

Ante, p. 69.

CHILD LABOR

SEC. 25. (a) Section 12 (relating to child labor) is amended by adding at the end thereof the following new subsection:

52 Stat. 1067; 63 Stat. 917. 29 USC 212.

"(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."

(b) Section 13(c)(1) (relating to child labor in agriculture) is amended to read as follows:

80 Stat. 834. 29 USC 213.

"(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

Supra.

"(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5),

80 Stat. 833. Ante, p. 56.

"(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

"(C) is fourteen years of age or older".

(c) Section 16 is amended by adding at the end thereof the following new subsection:

52 Stat. 1069; 71 Stat. 514. 29 USC 216.

"(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness

Penalty.

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of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

"(1) deducted from any sums owing by the United States to the person charged;

"(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

52 Stat. 1068. "(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

29 USC 215. Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States

80 Stat. 384. Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof,

48 Stat. 582; 53 Stat. 581. and for other purposes' (29 U.S.C. 9a)."

SUITS BY SECRETARY FOR BACK WAGES

63 Stat. 919; 80 Stat. 844. SEC. 26. The first three sentences of section 16(c) are amended to read as follows: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation

29 USC 216. Ante, pp. 55, 68. owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary."

ECONOMIC EFFECTS STUDIES

Ante, p. 72. SEC. 27. Section 4(d) is amended by—

(1) inserting "(1)" immediately after "(d)",

(2) inserting in the second sentence after "minimum wages" the following: "and overtime coverage"; and

(3) by adding at the end thereof the following new paragraphs:

Ante, p. 72. "(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees

Ante, p. 66. of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such

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employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976. Report to Congress.

"(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.". Reports to Congress. Ante, p. 69.

AGE DISCRIMINATION

SEC. 28. (a)(1) The first sentence of section 11(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630(b)) is amended by striking out "twenty-five" and inserting in lieu thereof "twenty". 81 Stat. 605.

(2) The second sentence of section 11(b) of such Act is amended to read as follows: "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.".

(3) Section 11(c) of such Act is amended by striking out ", or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance".

(4) Section 11(f) of such Act is amended to read as follows:

"(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.". "Employee."

(5) Section 16 of such Act is amended by striking out "$3,000,000" and inserting in lieu thereof "$5,000,000". 29 USC 634.

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as sections 16 and 17, respectively.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section: 29 USC 633.

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in 29 USC 633a.

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80 Stat. 378.

section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Reports.

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

"(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions.

"(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

"(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

"(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

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EFFECTIVE DATE

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-913 accompanying H.R. 12435 (Comm. on Education and Labor) and No. 93-953 (Comm. of Conference).

SENATE REPORT No. 93-690 (Comm. on Labor and Public Welfare).

CONGRESSIONAL RECORD, Vol 120 (1974):

Feb. 28, Mar. 5, 7, considered and passed Senate.

Mar. 20, considered and passed House, amended, in lieu of H.R. 12435.

Mar. 28, Senate and House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 15:

Apr. 8, Presidential statement.

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